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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. 567.

CHARLES H. ALBERS et al., as Owners of Certain Shares of New Orleans, Texas & Mexico Railway Company, Petitioners,

vs.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor, et al., Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

JURISDICTION.

The sole ground upon which petitioners ask this Court to exercise its discretion to grant the writ is that the decision of the Court below has not given proper effect to an applicable decision of this Court within the meaning of clause (6) of paragraph 1 of Rule 19 of the Supreme Court Rules.

PRELIMINARY STATEMENT.

The reorganization proceedings for the Missouri Pacific Railroad Company and twenty-four of its subsidiary railroad companies has been in progress for almost twenty-three years. The delay in reorganization has inevitably worked a hardship upon the countless thousands of holders of the securities of debtor companies. Petitioners who have

contributed nothing to the effort to reorganize debtor railroads and who only appear in the proceedings at the eleventh hour, as apostles of delay, ask this Court to aid their effort. They are without doubt aware that if the consummation of the Plan can but be delayed until May 10, 1956, the provisions of Section 208 of the Bankruptcy Act will be available, and that thereafter the mere filing of a petition in the District Court asking the Commission to consider changed conditions will immediately act to suspend all further proceedings for approval of the plan. Petitioners certainly know that if the writ is granted on their petition the Agreed Plan may be further jeopardized by the resulting delay, since by the terms of the stipulations, through which the plan was presented to the Commission, the agreement of the parties to support the plan is not binding upon them after May 1, 1956 [R. I-A, par. (6). page 5, of Stipulation and Agreement, marked Exhibits 1 to 17].

The plan of reorganization, consummation of which petitioners seek to delay, is referred to as an "Agreed Plan" since it is supported and was presented to the Commission by most of the parties in interest to the proceeding. It provides for no forfeiture, as did the Florida East Coast plan, but gives recognition and fair treatment to both the preferred and common stock of the principal debtor company. It has the overwhelming support of both creditors and stockholders of debtor companies. (See Certificate of Commission re: vote on Plan, Appendix A to this brief.) Further delay in consummation of the plan will work further hardship upon the security holders and will also be against the public interest.

STATEMENT OF CASE.

Petitioners' application for certiorari has to do solely with the effect upon the Missouri Pacific System reorganization of this Court's decision in **St. Joe Paper Co. v. At-**

lantic Coast Line R. Co., 347 U. S. 298, referred to as the **St. Joe case.** In the course of this brief, Missouri Pacific Railroad Company will be referred to as **Missouri Pacific,** and New Orleans, Texas & Mexico Railway Company as **New Orleans.** Both companies are debtors in the Missouri Pacific Proceedings.

The plan of reorganization in the **St. Joe case** involved a consolidation of the Florida East Coast Railway Company, **then in bankruptcy,** with the Atlantic Coast Line Railroad Company, **which was not in bankruptcy.** The issue in the St. Joe case is thus stated at the threshold of the opinion:

> "The sole question for decision in this case is whether the Interstate Commerce Commission has the power under § 77 of the Bankruptcy Act to submit a plan of reorganization to a district court whereby a debtor railroad would be compelled to merge with another railroad having no prior connection with the debtor" (p. 298).

Defining what he means by "forced merger", Mr. Justice Frankfurter, in Note 2 says:

> "By 'forced merger' plan, or 'compulsory merger' plan, is meant a merger plan foisted upon one of the parties by the Commission, as distinguished from a merger voluntarily initiated by the participating carriers" (p. 302).

The Interstate Commerce Commission (hereinafter referred to as the Commission), in approving the Missouri Pacific Plan, held that the merger provisions of the Plan originated with the carriers involved and were not **forced** or **foisted** upon them by the Commission (290 I. C. C. 477, 614 et seq.). The District Court, in approving the Plan, reached the same conclusion (129 Fed. Supp. 392, 399 et seq.). The Court of Appeals of the Eighth Circuit affirmed the findings of the Commission and of the lower

court concerning the origin of the merger provisions of the Plan (225 Fed. 2d 761, 765). Since petitioners are seeking to overrule the factual findings of the Commission and of the two Courts below, we here set forth a brief chronological statement concerning the consolidation provisions at the various stages of the reorganization proceedings.

The First Report of the Commission in the Missouri Pacific Reorganization is dated January 10, 1940 (239 I. C. C. 7), and on page 45 of that Report the Commission says:

> "The three principal debtors on February 4, 1936, presented to us a plan of reorganization of the Missouri Pacific System, and much of the time consumed in the hearings before us in this proceeding related to the provisions of this plan. The plan provides for the consolidation into a new company of the 28 companies, omitting the Missouri-Illinois Railroad Company, Debtor, which now constitute parts of the System through ownership of their securities by the Missouri Pacific or by one of its subsidiaries."

The plan filed with the Commission by Debtor companies appears in Record, Volume I-A, as Trustee's Exhibit No. 17.[1] On January 22, 1935, prior to its presentation to the Commission, the plan was approved by action of the boards of directors of the principal Debtor Companies.[2]

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[1] Volume I-A of Record does not show paging. Exhibit No. 17 begins about 48 sheets from end of the volume and is entitled Summary of Plan of Reorganization for Missouri Pacific System to Be Presented by Missouri Pacific Railroad Company, New Orleans, Texas and Mexico Railway Company, International-Great Northern Railroad Company, Debtors, to the Interstate Commerce Commission.

[2] The pertinent minutes of the boards of directors are set forth in Volume I-A of the Record. For the Missouri Pacific at page 4 of Trustee's Exhibit No. 14; for the New Orleans at page 4 of Trustee's Exhibit 15; and for the International at page 4 of Trustee's Exhibit No. 16.

The Commission's first plan approved April 9, 1940, followed the recommendations of the Debtors with respect to a system reorganization (240 I. C. C. 15, 32).

The proceedings, due to changed conditions, were thereafter returned to the Commission for further consideration. Thereupon, the debtor Missouri Pacific and Alleghany Corporation joined with those representing many of the principal creditors in suggesting a so-called compromise plan bearing date September 27, 1943, which likewise called for a system reorganization (257 I. C. C. 479, 482).

The second plan, as finally approved by the Commission October 9, 1944 (257 I. C. C. 745, 751), was a modification of the first plan. It differed in other respects from the compromise plan, but continued to provide for a system reorganization.

Again, due to changed conditions, the proceedings were returned to the Commission for further consideration.

The Commission's Fourth Supplemental Report as modified by its Fifth Supplemental Report of December 29, 1949 (275 I. C. C. 203, 239), constituting the third plan of reorganization, was a modification of the previous plans and again provided for a system reorganization.

The Commission found in November, 1952, that changed conditions required that it re-examine and reconsider the 1949 plan pursuant to the provisions of Section 208 (b) of Title 11, U. S. Code, and if necessary, modify that plan.

On February 17, 1954, an Examiner's Proposed Report, recommending substantial modifications and changes in the 1949 modified plan, was issued.

The "Agreed System Plan."

On January 8, 1954, on motion of Guy A. Thompson, Trustee of the Debtor Companies (R. II, page 161), the District Court entered an order (R. II, page 165) directing said Trustee to offer his services and fully cooperate with

the parties to the proceedings in an effort to aid them in composing their differences with respect to a plan of reorganization, and to consider also and, if possible, agree upon steps that might reasonably be taken to progress and expedite a final reorganization of Debtor Companies.

As a result of these negotiations, stipulations were signed by nearly all of the major parties in interest to the reorganization proceedings, approving and agreeing to support what was referred to therein as an "Agreed System Plan." This plan modified in certain respects the plan approved by the Examiners in their Proposed Report of February 17, 1954, which was itself a modification of the Commission's 1949 modified plan. The stipulation and agreement respecting the "Agreed System Plan" will be found beginning on Sheet 18 of Volume I-A of the Record in this case and is a part of Trustee's Exhibit No. 3 (offered in evidence R. I, p. 54).

The aforesaid stipulations were filed with the Commission on May 12, 1954, and the modified Plan of Reorganization contained therein was approved by the Commission and filed with the District Court on November 12, 1954 (R. IV). It substantially adopted the modifications of the 1949 plan proposed by the Examiners in February, 1954, as further modified by the terms of the Agreed System Plan.

It should be noted that the Agreed System Plan is the first plan approved by the Commission for the Missouri Pacific and its subsidiaries which gives stockholders of the Missouri Pacific a substantial interest in the reorganized Company.

The stipulation was not signed by the Petitioners. They hold slightly more than 4% of the New Orleans capital stock. On the other hand, Chemical Bank & Trust Company (now Chemical Corn Exchange Bank), Trustee under the 5¼ Secured Serial Indenture, executed the stipulation. It is the record owner of more than 81% or 121,460 shares of the New Orleans stock (R. II, p. 119). Mr. Thompson, as

Trustee of the Missouri Pacific Debtor, holds 12% or 18,271 shares of this stock. He negotiated the Agreed System Plan set forth in the stipulations filed with the Commission and strongly supports the Plan (R. I, p. 74).

The Vote on the Plan.

On May 10, 1955, the Commission submitted the Plan here under consideration for acceptance or rejection by creditors and stockholders entitled to vote thereon. Of the fourteen affected classes in which ballots were cast, twelve thereof voted to accept the Plan by majorities of those voting ranging from 92 percent to 100 percent. The Missouri Pacific common stock which was voted favored acceptance by 99.60 percent, and Missouri Pacific preferred stock which was voted favored acceptance by 95.01 percent. (See Certificate of Commission, Appendix A of this brief.)

In Class 3 (the New Orleans capital stock) the percentage of the stock voted which favored acceptance of the Plan was 59.17. In Class 19 (the Missouri Pacific Secured Serial Bonds, back of which New Orleans stock is pledged), the percentage of the bonds voted which favored acceptance of the Plan was 63.94 (Certificate of Commission, Appendix A). If there be added to the securities voted with respect to Classes 3 and 19 the New Orleans stock and the Missouri Pacific Secured Serial Bonds which were at the time held unpledged by Mr. Thompson as Trustee of the Missouri Pacific, and if they were counted as favoring the Plan, both Classes, 3 and 19, would have favored the Plan by more than two-thirds majority. In the case of Class 3 the favorable percentage would have been more than 71, and with respect to Class 19 the favorable percentage would have exceeded 70 percent. The Trustee of course advocated approval of the Plan.

On September 19, 1955, the District Court entered its order confirming the Plan of Reorganization (135 Fed. Supp. 102).

Corporate History.

Missouri Pacific's acquisition of the New Orleans stock was authorized by the Commission December 8, 1924 (94 I. C. C. 191), and the New Orleans acquisition of I.-G. N. stock was authorized June 12, 1924 (90 I. C. C. 262).

On February 25, 1929, Missouri Pacific filed an application under Section 5 (2) of the Interstate Commerce Act for authority to acquire control under lease of the Gulf Coast Lines and International-Great Northern. In the course of its opinion authorizing such acquisition the Commission said (166 I. C. C. 154, 188):

> "The Plan would practically, in effect, accomplish much that would be accomplished by a complete consolidation of the properties of the respective companies into one system of ownership, management and operation."

Unification pursuant to the foregoing order was delayed by the 1929 depression, and on March 31, 1933, the three principal debtor companies filed their petitions in the same proceedings for reorganization under Section 77 of the Bankruptcy Act.

Of the New Orleans stock approximately 94.2 percent, or $13,973,100 par value is held by or for account of Missouri Pacific, and the remaining $859,800 par value is publicly held (R. I, p. 126). Of the $13,973,100 of said stock held by or for account of Missouri Pacific, $12,146,000 par value is pledged (R. I, p. 142) as collateral for $12,140,000 principal amount of Missouri Pacific Secured Serial Bonds. Missouri Pacific Trustee has acquired through tenders and is holding as an asset of the Missouri Pacific estate, $1,715,000 principal amount of these Secured Serial Bonds (R. V, p. 124). The $12,146,000 par value of New Orleans stock pledged as security for the Missouri Pacific Secured Serial Bonds is registered in the name of Chemical Bank & Trust

Company (which name has been changed to Chemical Corn Exchange Bank), Trustee under the indenture, and has been voted by Missouri Pacific Trustee under proxies issued by the Bank pursuant to court order. The Bank has signed the stipulation in support of the Agreed System Plan (p. 14 thereof).

The indenture under which the New Orleans stock is pledged as collateral, does not provide that the bondholders shall have any right to vote the pledged stock after default.

The Petitioners.

Charles Albers and associates, who appear in the case at bar as Petitioners for writ of certiorari, own slightly in excess of 4 percent of the total outstanding shares of New Orleans stock. They acquired their holdings within the past ten years (R. I, pp. 119-120). With the sagacity often displayed by speculators, they of course realized the strategic or nuisance value that might attach to this small outstanding block of publicly held New Orleans stock. As emphasized in the Court of Appeals' decision (Petitioners' Brief, p. 27), this group first appeared in the proceedings on September 28, 1954, in support of objections to the plan of reorganization now under consideration. This was more than four months after the Agreed System Plan was filed with the Commission. They offered no testimony at the hearing in the District Court, and rely here, as they did in the Courts below, upon certain language appearing in the opinion in the St. Joe case, which they contend vitiates the Agreed System Plan. We find nothing in the Court of Appeals' opinion evidencing a decision of important public concern, especially in the face of factual findings by the District Court, and by the Commission (approved by the Court of Appeals) to the effect that the merger provisions of the Plan emanated from the real parties in interest, including the debtors, and were not forced or foisted upon them by the Interstate Commerce Commission.

ARGUMENT.

The principal argument of the Petitioners is that, under this Court's decision in the **St. Joe** case, Section 5 (11) of the Interstate Commerce Act must be complied with in order to carry out the proposed unifications. That question, however, is not before this Court on this record and will not arise at any time in these reorganization proceedings. It is not before the Court on this record because Section 5 (11) prescribes the procedures to be used to carry out unifications authorized by the Commission and the time for carrying out the unifications contemplated by the pending Plan of Reorganization has not yet come. The question will not hereafter arise in these reorganization proceedings because counsel for the Reorganization Managers have advised counsel for the Bankruptcy Trustee that appropriate action will be taken by the Boards of Directors and the stockholders of each of the corporations whose properties are to be acquired by the Missouri Pacific (all the stock of which is owned within the System except 5.8% of the stock of the New Orleans). There is, accordingly, no possible merit in the contention that the decisions of the District Court and the Court of Appeals in this case are or can be inconsistent with the decision of this Court in the **St. Joe** case.

But in any event the St. Joe case deals only with the applicability of Section 5 to initiation of a unification under Section 77. It seems apparent from the entire opinion in the St. Joe case and from the reasons upon which it is predicated that this Court merely intended to restrict the **initiation** by the Commission of consolidations in reorganization proceedings. The entire purport of the opinion is to the effect that merger provisions of any reorganization plan must represent the desire of the participating carriers expressed in some appropriate manner.

A merger or system reorganization having thus been **initiated** by the participating carriers, the court leaves the formulation of the details of the plan of reorganization, including the allocation of new securities, to be determined in accordance with the provisions of Section 77. Section 77 (d) provides that the plan itself may be originated in some five or six different ways, but if it involves a merger or consolidation of railroads **having no prior connection with each other,** the validity is dependent upon the merger aspects of the plan having been initiated by the carriers involved rather than forced upon them by the Commission over their objection.

The initiation of a consolidation in a Section 77 reorganization may be expressed by action on the part of the Boards of Directors of the several companies, or in a system reorganization may be the result of reasonable implications arising out of the previous corporate relationship of parent and subsidiaries.

In the merger of two carriers not previously affiliated, as was the situation in the St. Joe case, "the merger must be worked out and put before the Commission by the merging carriers." But from Note 12 of the opinion, it seems clear that this implied requirement which this Court found in the consistency clause of Section 77 (f) was not intended by the Court to apply to mergers involving a parent and its subsidiaries or the internal reorganization of system lines.

The situation presented in the case at bar comes literally within the following language from Note 12 of the opinion, to-wit:

> "In all the reported cases of reorganization involving mergers, the merger was either proposed by the debtor in conjunction with the other party, or the merger involved a parent and its subsidiaries, and was

treated essentially as an internal reorganization. In any event, we are not now called upon to pass on the validity of the latter type of merger" (p. 309).

Further support of the view that this Court intended to except mergers involving a parent and its subsidiaries from the effect of the rule laid down in the St. Joe case is found in Note 8 to that opinion. The second paragraph of that Note states:

> "In this connection it is interesting to note that in the course of a proposed comprehensive revision of § 77 in 1939, the question here in issue would have been made absolutely clear by the addition of the following proviso to the merger subsection:
>
> "*Provided,* That nothing in this section shall authorize compulsory merger or consolidation . . ." (p. 307).

Later in said Note 8, in referring to the just quoted proviso, it is said:

> "Cassius M. Clay, Assistant General Counsel of the RFC and intimately acquainted with problems of railroad reorganization, questioned the need for the proviso on the ground that the consistency clause in subsection (f) already covered the matter and that the proviso might be construed to prevent the merger of a parent and its subsidiaries" (p. 308).

The Consistency Clause.

There is no specific language in Section 77 prohibiting a forced or compulsory merger, but 77 (f) contains the following language, referred to as the "consistency clause":

> "Upon confirmation of the plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger

of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of Chapter 1 of Title 49 as on August 27, 1935, or thereafter amended."

As heretofore emphasized, the decision in the St. Joe case was by its terms confined to the issue in that case and involved solely the requirements respecting the **initiation** of the merger. There is nothing in the law of Louisiana or in the law of Missouri which requires stockholders' action as distinguished from resolutions by the Board of Directors in **initiating** the merger. The same is true with respect to Section 5 of the Interstate Commerce Act. The merger may be initiated by the Boards of Directors of the interested carriers, and the procedure is then set out in Section 5 (2) of the Interstate Commerce Act. If the Commission makes the necessary findings, including that of public interest, it enters an order authorizing but not requiring the merger.

Section 5 (11) has to do with the carrying out of the merger, and is the provision requiring a vote of the stockholders in conformance with state laws. As pointed out above, the time has not arrived when the provisions of 5 (11) may be applied in this case, even if they are applicable in any event to **carrying out** a Section 77 plan. Section 5 (11) has to do with carrying out the merger after the Commission has given its authority.

An Internal Reorganization Is Here Involved.

The opinion in the St. Joe case does not apply to an "internal reorganization" of system lines. Petitioners contend that the case at bar does not involve an internal reorganization since a majority of New Orleans stock owned by the Missouri Pacific trust estate is pledged under the Missouri Pacific Secured Serial Indenture and is registered in the name of the Indenture Trustee.

But the Secured Serial Bondholders do not own the pledged stock—they merely have a lien upon it. They are not creditors of the New Orleans, but are creditors of the Missouri Pacific. If the Missouri Pacific were separately reorganized it is reasonable to assume that these Secured Serial Bondholders would be paid in new securities of the reorganized Missouri Pacific, thus freeing the pledged New Orleans stock from the existing mortgage lien.

In **Continental Illinois National Bank & Trust Co. v. C. R. I. & P. Ry. Co.**, 294 U. S. 648, 683, this Court said:

> "As has already been shown, the equity in the collateral remaining in the railroad company is property; and over this property, wherever located, the federal district court is given exclusive jurisdiction by the precise language of § 77, just quoted. As a necessary consequence of that jurisdiction, the court must have the power to preserve and safeguard the property for the benefit of the trust estate so far as that is compatible with the rights of the pledgees."

In **Collier on Bankruptcy** (14th Ed.), Vol. 6, pp. 585-6, it is stated:

> "Hence it is not surprising to find that when possession of the debtor's property is held by a creditor, such as a pledgee or mortgagee, whose claim is not in dispute and who does not dispute the debtor's title but claims the right to hold the property and use it as security, the courts have generally ruled that this possession is not sufficient to defeat the reorganization court's summary jurisdiction either to enjoin the use of the security as by sale or to retake possession thereof."

In a much-cited article in the **Yale Law Journal** (Vol. 50, p. 478 l. c.), published in 1941, the author, after discussing the pledgee's right in reorganization proceedings to income from the pledged collateral, says:

"Much the same may be said of the right to vote pledged stock, where it is expressly granted to the pledgee. It is probable that both income and voting rights will be classified as 'remedies' or mere incidental powers subject to the control of the reorganization court, whenever the paramount interests of the other creditors seem to call for an injunction against their exercise."

The Petitioners own only about 4 per cent of the voting stock of the New Orleans. They do not here profess to own any of the Secured Serial Bonds. The Secured Serial Indenture Trustee, holder of record of more than 80% of the shares, is a signatory of the stipulation approving the Agreed System Plan. The Plan provides for release of the pledged New Orleans stock and for allocation to these Missouri Pacific Secured Serial Bondholders of new securities which, according to the findings below, fully meet priority rules. The Bankruptcy Trustee supports the plan and the Bankruptcy Court has broad equity powers with authority to protect the equity of the trust estate in pledged securities. In the light of these facts, it is clear that we are concerned at bar with an "internal reorganization," as that term is used in the St. Joe opinion.

CONCLUSION.

We submit that petitioners have not demonstrated that this Court should exercise its discretion to grant the writ pursuant to paragraph 1 of Rule 19 of the Supreme Court Rules.

This Court well knows the need for a prompt reorganization of the Missouri Pacific System. Reorganization has been in progress for nearly 23 years. In the minds of the security holders and the public, the delay is inexcusable. We most earnestly urge that the Petition for Certiorari

be denied, and that the lower court be permitted to proceed with the consummation of this long drawn-out reorganization.

Respectfully submitted,

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APPENDIX A.

CERTIFICATE.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D. C., on the 5th day of July, A. D. 1955.

Finance Docket No. 9918.

Missouri Pacific Railroad Company Reorganization.

The Commission, Division 4, having on May 10, 1955, pursuant to its order of May 2, 1955, in this proceeding, submitted for acceptance or rejection by creditors and stockholders of classes shown below, the plan of reorganization of the Missouri Pacific Railroad Company et al., debtors, approved by the Commission by its seventh and eighth supplemental reports and orders of July 29 and November 9, 1954, and approved by the United States District Court for the Eastern Judicial District of Missouri, Eastern Division, by order filed February 25, 1955:

Class 1	Common stock of Missouri Pacific Railroad Company.
Class 2 (a)	Preferred stock of Missouri Pacific Railroad Company.
Class 2 (b)	Missouri overcharge claims which the court has found are entitled to be paid in preferred stock of Missouri Pacific Railroad Company.

Class 3	New Orleans, Texas & Mexico Railway Company capital stock, including that outstanding in the hands of the public and that pledged under Missouri Pacific Railroad Company 5¼-percent secured serial bonds.
Class 4 (a) (1)	General unsecured claims against New Orleans, Texas & Mexico Railway Company and its subsidiary debtors other than International-Great Northern Railroad Company.
Class 4 (a) (2)	General unsecured claims against the Missouri Pacific Railroad Company and other debtors except the New Orleans, Texas & Mexico Railway Company and its subsidiary debtors.
Class 4 (b)	Missouri Pacific Railroad Company 5½-percent twenty-year convertible bonds.
Class 13	Little Rock & Hot Springs Western Railroad Company bonds.
Class 14	Central Branch Union Pacific Railway Company bonds.
Class 15	Boonville, St. Louis & Southern Railway Company bonds.
Class 17	Missouri Pacific Railroad Company first and refunding mortgage bonds.
Class 18	Missouri Pacific Railroad Company general mortgage bonds.
Class 19	Missouri Pacific Railroad Company 5¼-percent secured serial bonds.
Class 21 (a)	New Orleans, Texas & Mexico Railway Company first mortgage bonds.

Class 22	International-Great Northern Railroad Company first mortgage bonds.
Class 23	International-Great Northern Railroad Company adjustment mortgage bonds.

It is hereby certified, That proper ballots as shown in table No. 2 hereof were received from creditors and stockholders voting bonds, unsecured claims, and preferred and common stock in each of the classes, and constituting the percentages of the total principal amount or number of shares outstanding in each class as shown in the following table No. 1:

TABLE NO. 1.

Class	Amount Outstanding in Hands of Public at May 10, 1955	Total Amount Voted	Percentage
1	813,143 (shares)	560,916 (shares)	68.98
2 (a)	701,901 (shares)	382,355 (shares)	54.47
2 (b)	$ 303,500.00	$ 7,318.79	2.41
3	130,058 (shares) [1]	78,743 (shares)	60.54
4 (a) (1)	$ 13,884.83	0	0
4 (a) (2)	323,350.00	$ 26,239.02	8.11
4 (b)	45,493,000.00	21,379,000.00	46.99
13	1,140,000.00	271,000.00	23.77
14	523,000.00	298,000.00	56.98
15	5,500.00	0	0
17	223,190,500.00	97,157,500.00	43.53
18	49,308,500.00	22,318,500.00	45.26
19	10,425,000.00	7,236,000.00	69.41
21 (a)	40,615,900.00	17,231,500.00	42.42
22	28,750,000.00	10,971,700.00	38.16
23	13,807,700.00	4,963,100.00	35.94

[1] Includes 121,460 shares of New Orleans, Texas & Mexico Railway Company stock pledged under Missouri Pacific Railroad Company secured serial 5¼-percent bonds. Each $1,000 bond voted in class 19 has been counted as a vote in class 3 for 10 shares of stock.

It is further certified, That proper ballots for acceptance or rejection of the plan was transmitted within the time specified in the order of May 2, 1955, by creditors and stockholders as shown in the following table No. 2:

TABLE NO. 2.

Class	Amount Outstanding in Hands of Public at May 10,1955	Proper Ballots Voted —Shares or Principal Amount Voted— Accept	Percent	Reject	Percent
1	813,143 (shares)	558,661	99.60	2,255	.40
2 (a)	701,901 (shares)	363,280	95.01	19,075	4.99
2 (b)	$ 303,500.00	$ 7,318.79	100.00	0	0
3 [1]	130,058 (shares)	46,636	59.23	32,107	40.77
4 (a) (1)	$ 13,884.83	0	0	0	0
4 (a) (2)	323,350.00	$ 26,239.02	100.00	0	0
4 (b)	45,493,000.00	21,361,000.00	99.92	18,000.00	.08
13	1,140,000.00	271,000.00	100.00	0	0
14	523,000.00	298,000.00	100.00	0	0
15	5,500.00	0	0	0	0
17	223,190,500.00	89,655,500.00	92.28	7,502,000.00	7.72
18	49,308,500.00	22,264,000.00	99.76	54,500.00	.24
19	10,425,000.00	4,632,000.00	64.01	2,604,000.00	35.99
21 (a)	40,615,900.00	16,264,500.00	94.39	967,000.00	5.61
22	28,750,000.00	10,756,700.00	98.04	215,000.00	1.96
23	13,807,700.00	4,953,100.00	99.80	10,000.00	.20

[1] See Note 1, Table No. 1.

It is further certified, That the amounts shown above as voted on proper ballots are after giving effect to reductions in the principal amounts or numbers of shares stated on said ballots because, (1) with respect to bonds, the principal amount stated was not fully supported by record holdings of registered bonds or listed outstanding serial numbers of bearer bonds, or ownership was not satisfactorily established of securities voted on more than one ballot, and (2) with respect to stock, the number of shares stated was in excess of the amount of which the voter or his principal was the record holder; and that the amounts eliminated for said reasons from ballots voting to accept and reject, respectively, are set forth below in table No. 3.

TABLE NO. 3.

Class	Accept	Reject
1	2,655 shares	195 shares
2 (a)	1,625 shares	300 shares
4 (b)	$ 80,000	0
17	597,000	$47,000
18	204,000	1,000
19	98,000	30,000
21 (a)	55,000	4,000
22	151,000	10,600
23	61,500	0

It is further certified, That ballots deemed defective, for the reason they failed to show whether the ballots were intended for acceptance or rejection of the plan, were transmitted within the time specified in the order of May 2, 1955, by creditors and stockholders in aggregate principal amount or number of shares as follows, viz.: Class 1, 840 shares; Class 2 (a), 827 shares; Class 4 (a) (2), $2,472; Class 4 (b), $430,000; Class 17, $2,743,500; Class 18, $185,000; Class 19, $3,000; Class 21 (a), $927,000; Class 22, $190,000; and Class 23, $140,000.

It is further certified, That ballots deemed defective, for the reason they failed to state the number of shares of stock or principal amount of bonds voted, were transmitted within the time specified in the order of May 2, 1955, by creditors and stockholders, in numbers and classes as follows:

TABLE NO. 4.

Class	Number of Ballots		
	Accept	Reject	Other [1]
1	26	1	7
2 (a)	28	1	8
3	1	0	0
4 (b)	16	0	6
17	139	5	28
18	20	0	3
19	3	3	0
21 (a)	23	1	5
22	21	1	1
23	1	0	1

[1] Did not designate whether for acceptance or rejection.

It is further certified, That other ballots were transmitted by creditors and stockholders within the time specified in the order of May 2, 1955, which purported to vote shares of stock or bonds or claims in the amounts and in the manner stated in table No. 5 below, but which, in accordance with the "Rules for Handling and Counting Ballots of Creditors and Stockholders" set forth in the Appendix to the said order of May 2, 1955, are deemed defective for one or more of the following stated reasons: (1) the ballots were not properly signed, (2) the voter attempted to vote stock or registered bonds of which he or his principal was not the record holder at the close of business on May 10, 1955, (3) the voter, not being a record holder of registered bonds, failed to list serial numbers of unregistered bonds in support of the amount voted, or the numbers listed were not outstanding, (4) the signature of the voter was not witnessed or (in the case of a corporation) not attested, (5) the ballot or attachments failed to indicate whether the voter was executing the ballot as principal or in a representative capacity, (6) no satisfactory evidence was submitted of the authority of an agent or fiduciary to execute the ballot, or (7) the address of the voter or witness was omitted from the ballot or was incomplete; and that amounts attempted to be voted on a ballot deemed defective for more than one of the foregoing reasons has not been duplicated but is included in only one of the aforementioned categories.

TABLE NO. 5.

Class	Ballots Not —Properly Signed— Accept	Reject	Stock and Registered Bonds Not Voted by —Record Holder— Accept	Reject	Serial Numbers of —Bonds Not Listed— Accept	Reject
1	10,928 sh.	3 sh.	10,265 sh.	35 sh.	0	0
2 (a)	43,230 sh.	0	19,977 sh.	200 sh.	0	0
3	11 sh.	0	0	41 sh.	0	0
4 (a) (2)	$ 2,190	0	0	0	0	0
4 (b)	2,127,000	$ 3,000	0	0	$ 524,000	0
13	0	0	0	0	11,000	0
17	2,874,800	10,000	$22,000	0	2,443,500	$36,000
18	1,722,000	0	0	0	952,000	10,000
19	22,000	0	0	0	40,000	51,000
21 (a)	135,600	0	0	0	323,000	0
22	935,500	2,000	0	0	381,200	0
23	2,467,500	0	0	0	133,000	0

TABLE NO. 5—Continued.

Class	Signature Not Witnessed or ———Attested——— Accept	Reject	Failure to Indicate Whether Principal or Representative Accept	Reject	No Satisfactory Evidence of Authority —to Execute Ballots— Accept	Reject
1	13,794 sh.	100 sh.	5,233 sh.	400 sh.	350 sh.	0
2 (a)	21,469 sh.	859 sh.	11,106 sh.	6,000 sh.	25 sh.	1,311 sh.
3	600 sh.	92 sh.	158 sh.	399 sh.	0	0
4 (a) (1)	$ 79.30	0	0	0	$ 3,500	0
4 (a) (2)	7,500	0	$ 9,370	0	69,221.53	0
4 (b)	1,892,000	$ 12,000	875,000	0	2,325,000	$ 6,000
13	631,000	0	1,000	0	5,000	0
14	26,000	0	0	0	14,000	0
17	9,294,500	5,859,000	3,605,000	$132,000	15,328,500	170,000
18	2,700,000	5,000	1,944,500	0	2,996,000	0
19	114,000	114,000	92,000	20,000	120,000	84,000
21 (a)	4,081,500	0	704,000	11,000	1,447,500	7,000
22	2,228,000	50,000	452,000	1,000	3,409,000	2,000
23	626,000	0	202,000	0	518,400	0

TABLE NO. 5—Continued.

Class	Addresses Omitted or Incomplete—Accept	Addresses Omitted or Incomplete—Reject	Totals—Accept	Totals—Reject
1	902 sh.	0	40,842 sh.	538 sh.
2 (a)	2,035 sh.	0	97,842 sh.	8,370 sh.
3	82 sh.	0	851 sh.	532 sh.
4 (a) (1)	0	0	$ 3,579.30	0
4 (a) (2)	$ 1,560	0	89,841.53	0
4 (b)	169,000	$ 1,000	7,912,000	$ 22,000
13	0	0	648,000	0
14	0	0	40,000	0
17	485,500	5,000	34,053,800	6,212,000
18	165,000	0	10,479,500	15,000
19	223,000	20,000	611,000	289,000
21 (a)	137,000	0	6,828,600	18,000
22	35,000	0	7,440,700	55,000
23	0	0	3,946,900	0

By the Commission, division 4.

HAROLD D. McCOY,
Secretary.

(Seal)

Filed Jul. 6, 1955. James J. O'Connor, Clerk.

SUPPLEMENTAL CERTIFICATE.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D. C., on the 19th day of July, A. D. 1955.

Finance Docket No. 9918.

Missouri Pacific Railroad Company Reorganization.

It appearing, That this Commission, division 4, on July 5, 1955, issued its certificate showing the results of the submission to creditors and stockholders for acceptance or

rejection of the plan for the reorganization of the Missouri Pacific Railroad Company et al., debtors, approved by the Commission by its seventh and eighth supplemental reports and orders of July 29 and November 9, 1954, and approved by the United States District Court for the Eastern Judicial District of Missouri, Eastern Division, by order filed February 25, 1955;

It further appearing, That the amounts shown in Tables Nos. 1 and 2 of the said certificate as voted on proper ballots were after giving effect to reductions in the principal amount stated on said ballots because, *inter alia,* ownership was not satisfactorily established in respect to bonds voted on more than one ballot;

It further appearing, That subsequent to preparation of the data set forth in the said certificate conflicting claims of ownership with respect to certain of the bonds excluded for the foregoing reason have been resolved pursuant to and in accordance with "Rules for Handling and Counting Ballots of Creditors and Stockholders," set forth in the appendix to the order of the Commission, division 4, entered in this proceeding May 2, 1955, and that the aforesaid certificate should be supplemented and corrected to give effect thereto and to correct certain errors therein discovered after the date thereof:

It is hereby certified, That the amounts set forth in Tables Nos. 1, 2, 3, 4 and 5 of the said certificate dated July 5, 1955, with respect to the classes hereinafter stated, should be corrected to read as follows:

TABLE NO. 1.

Class	Amount Outstanding in Hands of Public at May 10, 1955	Total Amount Voted	Percentage
3	130,053 (shares) [1]	78,963 (shares)	60.71
4 (b)	$ 45,493,000	$21,437,000	47.12
13	1,140,000	218,000	19.12
14	523,000	299,000	57.17
17	223,190,500	97,254,000	43.57
18	49,308,500	22,412,500	45.45
19	10,425,000	7,258,000	69.62
21 (a)	40,615,900	17,092,500	42.08
22	28,750,000	11,032,500	38.37
23	13,807,700	4,993,300	36.16

[1] Includes 121,460 shares of New Orleans, Texas & Mexico Railway Company stock pledged under Missouri Pacific Railroad Company secured serial 5¼-percent bonds. Each $1,000 bond voted in class 19 has been counted as a vote in class 3 for 10 shares of stock.

TABLE NO. 2.

Class	Amount Outstanding in Hands of Public at May 10, 1955	Proper Ballots Voted —Shares or Principal Amount Voted— Accept	Percent	Reject	Percent
3 [1]	130,058 (shares)	46,726	59.17	32,237	40.83
4 (b)	$ 45,493,000	$21,419,000	99.92	$ 18,000	.08
13	1,140,000	218,000	100.00	0	0
14	523,000	299,000	100.00	0	0
17	223,190,500	89,747,000	92.28	7,507,000	7.72
18	49,308,500	22,358,000	99.76	54,500	.24
19	10,425,000	4,641,000	63.94	2,617,000	36.06
21 (a)	40,615,900	16,125,500	94.34	967,000	5.66
22	28,750,000	10,819,500	98.07	213,000	1.93
23	13,807,700	4,983,300	99.80	10,000	.20

[1] See Note 1, Table No. 1.

TABLE NO. 3.

Class	Accept	Reject
4 (b)	$ 96,000	0
13	1,000	0
17	604,000	$46,000
18	155,000	1,000
19	128,000	16,000
21 (a)	56,000	1,000
22	161,000	7,600
23	70,500	0

TABLE NO. 4.

Class	Number of Ballots		
	Accept	Reject	Other [1]
4 (b)	13	0	6
17	140	5	29
18	21	0	3
21 (a)	22	1	5
22	24	1	1

[1] Did not designate whether for acceptance or rejection.

TABLE NO. 5.

Class	Ballots Not —Properly Signed—		Stock and Registered Bonds Not Voted by —Record Holder—		Serial Numbers of —Bonds Not Listed—	
	Accept	Reject	Accept	Reject	Accept	Reject
2 (a)	43,330 sh.	0	19,977 sh.	200 sh.	0	0
4 (b)	$2,037,000	$ 3,000	0	0	$ 524,000	0
17	2,889,500	10,000	$22,000	0	2,443,500	$36,000
21 (a)	138,600	0	0	0	323,000	0
22	979,500	2,000	0	0	381,200	0

TABLE NO. 5—Continued.

Class	Signature Not Witnessed or —Attested—		Failure to Indicate Whether Principal —or Representative—		No Satisfactory Evidence of Authority —to Execute Ballots—	
	Accept	Reject	Accept	Reject	Accept	Reject
1	13,774 sh.	100 sh.	5,233 sh.	400 sh.	350 sh.	0
4 (b)	$1,912,000	$ 12,000	$ 746,000	$129,000	$ 2,245,000	$ 6,000
17	9,304,500	5,859,000	3,615,000	132,000	15,322,500	170,000
18	2,730,000	5,000	1,914,500	0	2,996,000	0
21 (a)	4,078,000	0	704,000	11,000	1,448,500	7,000
22	2,228,000	50,000	452,000	1,000	3,363,000	2,000

TABLE NO. 5—Continued.

Class	Addresses Omitted —or Incomplete—		Totals	
	Accept	Reject	Accept	Reject
1	902 sh.	0	41,452 sh.	538 sh.
2 (a)	2,035 sh.	0	97,942 sh.	8,370 sh.
4 (b)	$169,000	$1,000	$ 7,633,000	$ 151,000
17	485,500	5,000	34,082,500	6,212,000
18	165,000	0	10,479,500	15,000
21 (a)	137,000	0	6,829,100	18,000
22	35,000	0	7,438,700	55,000

It is further certified, That the amount of $2,743,500 shown in the first paragraph on page 4 of said certificate for class 17 should be corrected to read $2,746,500.

It is further certified, That the time given to voters in accordance with the said rules for handling and counting ballots to respond to communications addressed to them for the purpose of resolving conflicting claims of ownership has expired and all such claims have been resolved to the extent practicable and feasible.

It is further certified, That in all other respects said certificate, dated July 5, 1955, should be and should remain effective.

By the Commission, division 4.

HAROLD D. McCOY,
Secretary.

(Seal)

Filed Jul. 20, 1955. James J. O'Connor, Clerk.

FILED
JAN 5 1956
HAROLD B. WILLEY, C

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 567

CHARLES H. ALBERS, *et al.*, as Owners of Certain Shares of New Orleans, Texas & Mexico Railway Company,

Petitioners,

vs.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor, *et al.*,

Respondents.

BRIEF OF RESPONDENT CHEMICAL CORN EXCHANGE BANK, AS TRUSTEE UNDER THE INDENTURE SECURING THE MISSOURI PACIFIC SECURED SERIAL BONDS, IN OPPOSITION TO PETITION FOR CERTIORARI

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Dated: January 4, 1956.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

CHARLES H. ALBERS, *et al.*, as Owners of Certain Shares of New Orleans, Texas & Mexico Railway Company,
Petitioners,

vs.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor, *et al.*,
Respondents.

No. 567

BRIEF OF RESPONDENT CHEMICAL CORN EXCHANGE BANK, AS TRUSTEE UNDER THE INDENTURE SECURING THE MISSOURI PACIFIC SECURED SERIAL BONDS, IN OPPOSITION TO PETITION FOR CERTIORARI

The present brief is filed on behalf of Chemical Corn Exchange Bank, as Trustee under the Indenture, dated as of December 1, 1926, securing the Missouri Pacific Secured Serial Bonds, a respondent in the above-entitled proceedings. The Secured Serial Bonds are outstanding in the principal amount of $12,140,000, including $1,715,000 principal amount purchased and held by the Missouri Pacific Bankruptcy Trustee pursuant to Court order. They are secured by 121,460 shares (or approximately 81.9%) of the stock of New Orleans, Texas & Mexico Railway Company which, with fourteen wholly-owned subsidiaries (all subsidiary debtors in the Missouri Pacific reorganization proceedings), constitutes the portion of the Missouri Pacific System commonly known as the Gulf Coast Lines, extending generally along the Gulf Coast from New Orleans, Louisiana to Brownsville, Texas.

Statement of the Case

The proceedings herein relate to a plan of reorganization for the Missouri Pacific and its various subsidiary debtors, approved by the Interstate Commerce Commission in *Missouri Pacific Railroad Company Reorganization*, 290 I. C. C. 477, 674 (1954) and by the District Court in *In re Missouri Pacific Railroad Company*, 129 F. Supp. 392 (1955). The District Court's approval was affirmed by the Court of Appeals in *Albers* v. *Thompson*, 225 F. (2d) 761 (1955), to which the pending certiorari petition relates. After a ballot in which 63.94% of the Secured Serial Bondholders voting approved the plan, it was also confirmed by the District Court in *In re Missouri Pacific Railroad Company*, 135 F. Supp. 102 (1955).

The plan represents essentially the approval by the Commission of an "Agreed System Plan" approved by nearly all the major parties in interest in the reorganization proceedings following negotiations resulting from an order of the District Court (R. II, 165). This order directed Bankruptcy Trustee to offer his services and cooperate with the parties to the proceedings in an effort to aid them in composing their differences with respect to a plan of reorganization, and to consider also and, if possible, agree upon steps that might reasonably be taken to progress and expedite a final reorganization of the debtor companies.

Having regard to the treatment of the claims of the Secured Serial Bondholders under the Agreed System Plan, and to the desirability and importance of bringing these nearly twenty-three year old reorganization proceedings to an early conclusion, the Secured Serial Trustee concluded that the Agreed System Plan was one which it could approve and recommend to its bondholders. Accordingly, it entered into the Stipulation and Agreement relating to the Agreed System Plan which was filed by the Bankruptcy Trustee with the Commission (R. I-A, 18), recommended the plan to its bondholders, and supported it before the Commission and the Courts below. It approves and supports the plan here.

The plan provides, among other things, that with certain qualifications, the properties of the debtors and of two other companies shall be merged or consolidated by transfer of the assets and properties of all such companies to a new company, or, in the discretion of the reorganization managers, to the Missouri Pacific, the principal debtor (R. V, 2).

Argument

The sole question raised by the pending petition for certiorari is the effect on the plan of this Court's decision in *St. Joe Paper Co.* v. *Atlantic Coast Line Railroad Co.*, 347 U. S. 298 (1954), commonly referred to as the *St. Joe* case, relating to the application of Section 77 (f) of the Interstate Commerce Act.

We concur with the view expressed in the brief in opposition to the granting of the petition being filed by various other respondents, that this Court's decision in the *St. Joe* case related solely to the *initiation* of plans of merger, and with the conclusion of the Courts below that such initiation by the respective debtor companies, if such be required, has been sufficiently shown in the present case. Even if the provisions of Section 5 (11) of the Interstate Commerce Act, relating to stockholder approval in the *carrying out* of a merger, were deemed to be applicable to a merger plan approved by the Commission in a Section 77 proceeding, compliance therewith would be involved only in carrying out the plan after an order of the Commission under Section 77 (f), which is still *in futuro*.[1]

We concur also in the position taken in the brief being filed by other respondents that an "internal reorganization", expressly excepted by this Court from its conclusions

[1] In this connection, it may be noted that the Reorganization Managers are not limited to a statutory consolidation or merger in carrying out the plan, but have a broad choice of alternatives as to how the contemplated transfers of assets are to be carried out (R. V, 2-3, 28-29).

in the *St. Joe* case (347 U. S. at 309, Note 12), is here involved. So far as the New Orleans, Texas & Mexico is concerned, out of its 148,329 outstanding shares 139,731, or approximately 94.2%, are owned by the Missouri Pacific Bankruptcy Trustee subject as to 121,460 thereof to the pledge to the Secured Serial Trustee above referred to, and the Bankruptcy Trustee also holds $1,715,000 principal amount of the $12,140,000 of Secured Serial Bonds outstanding. We believe that after the satisfaction of the substantive rights of the Secured Serial Bondholders under the pledge there may well remain a substantial equity in such stock for the Missouri Pacific bankruptcy estate, and we recognize fully, and indeed urge, the right and jurisdiction of the bankruptcy court to preserve and safeguard that equity. *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648, 683 (1935). Under these circumstances, we believe an "internal reorganization", as defined in the *St. Joe* case, is clearly here presented.

Conclusion

In view of the foregoing, the petition for certiorari herein should be denied.

Respectfully submitted,

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DORR AND HAND,
Of Counsel.

Dated: January 4, 1956.

FILED
JAN 12 1956
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

NO. 567

CHARLES H. ALBERS, FRANCES M. BLAKELY, C. W. BODEN, AVERY BRUNDAGE, JOHN KATSULOS, MARGARET L. KENT, PAUL E. KLING, THOMAS B. SHEARMAN, JAMES SULLIVAN AND EDITH WESTERCAMP, OWNERS OF CERTAIN SHARES OF NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY,

Petitioners,

VS.

GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR, ET AL.,

Respondents.

REPLY BRIEF OF PETITIONERS

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January 12, 1956.

TWENTIETH CENTURY PRESS, INC., CHICAGO 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 567

CHARLES H. ALBERS, FRANCES M. BLAKELY, C. W. BODEN, AVERY BRUNDAGE, JOHN KATSULOS, MARGARET L. KENT, PAUL E. KLING, THOMAS B. SHEARMAN, JAMES SULLIVAN AND EDITH WESTERCAMP, OWNERS OF CERTAIN SHARES OF NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY,

Petitioners,

VS.

GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR, ET AL.,

Respondents.

REPLY BRIEF OF PETITIONERS

Petitioners herein briefly reply to certain arguments of the several respondents in their briefs in opposition. An extended argument on the points in question is not deemed appropriate at this time.

TIME OF SECTION 5(11) VOTE

The contention of respondents that the vote required by Section 5(11) of the Interstate Commerce Act may take place after confirmation of the plan is without merit. It is clear that the requirements of Section 5, including those of Section 5(11), must be complied with before the plan is approved by the Commission and as a prerequisite to such

approval. The Plan is void and cannot be validated by a vote subsequent to confirmation.

A vote after confirmation is an empty form. At that time, in the words of Senator Wheeler (*St. Joe* case, pages 311, 312):

> "* * * There is always the available cry—the courts should not disapprove any part of the reorganization plan, even though it be a consolidation matter, lest all the time and labor and expense which has gone into the reorganization proceeding be lost."

A vote after confirmation presents the stockholders with a *fait accompli*. There is no real choice available at that time. It is a "Hobson's choice" (*St. Joe* decision, page 313), *i.e.* no choice at all.

INITIATION OF THE PLAN

Respondents contention that the initiation of a merger may be effected by director action is erroneous. In the states of incorporation of Missouri Pacific and New Orleans stockholder action is essential. (See Missouri and Louisiana Statutes, Appendix C to Petition).

The stockholders of New Orleans were not given an opportunity to vote on the plan prior to its approval. The confirmation vote (see *infra*) indicates that the necessary votes could not have been obtained if the opportunity had been afforded.

In any event, the board of directors of New Orleans did not vote on the Plan until October 12, 1954, nearly two months after it was approved by the Commission in its Seventh Report. This action was taken by a captive board which was elected by, and a mere creature of the bankruptcy trustee rather than a representative of the stock-

holders. (R.II page 127). This bankruptcy trustee has persisted in acting in a fiduciary capacity for all three debtor railroads despite conflicting interests. In these proceedings he has dropped any pretense at impartiality and appears as an advocate of the Plan.

The initiator, author and main proponent of the Plan was not New Orleans, its stockholders or its directors, but the bankruptcy trustee.

INTERNAL MERGER

The proposed merger is not an internal merger because Missouri Pacific has no right to vote any of the New Orleans stock. The value assigned to the pledged New Orleans stock did not exceed the claim of the Missouri Pacific 5¼% bondholders. An identical value was assigned to the publicly held shares. (R. Vol. V page 118; R. IV pages 35205, 35207). The Plan, therefore, does not recognize that Missouri Pacific has any equity in the pledged shares.

Neither the bankruptcy Trustee nor the Chemical Corn Exchange Bank has any right to vote New Orleans stock on a merger or plan of reorganization. Even if they had such a right, it would not be the right of Missouri Pacific, but would be exercisable by them as fiduciaries for all the persons represented by them.

This is not an internal merger.

THE "AGREED SYSTEM PLAN"

Plans agreed to in advance and presented as an accomplished fact were an evil of equity receiverships which interfered with an independent and impartial appraisal by the Court. One of the main purposes of Section 77 was to do away with such agreements. *In re New York, New Haven*

& Hartford R. Co., 147 F. (2d) 40, 49 (C.C.A. 2d, 1945). See *Case* v. *Los Angeles Lumber Co.*, 308 U.S. 106, 128, 129 (1939). Here, not only was the Plan agreed to in advance but it was formulated pursuant to an order of the same District Judge who later sat in judgment upon it. (R. Vol. II pages 167 and 169).

THE VOTE ON CONFIRMATION

The results of the confirmation vote are immaterial because the Plan is illegal and void *ab initio*. The results of the confirmation vote are not part of the record and are not properly before the Court on this Petition. However, the results of the vote lend support to the position of petitioners.

We note first that the Plan was rejected by the two classes of security holders interested in the New Orleans stock, *viz.*, Class 3 consisting of the holders of publicly held New Orleans stock and Missouri Pacific 5¼% Bondholders voting 10 pledged shares of that stock for each $1,000 bond, and Class 19 consisting of the 5¼% Bondholders alone.

In the light of the voting requirements of Section 5(11) it is significant that only 46,726, or 35.9% of the total outstanding shares of New Orleans stock voted to accept the Plan. Under Section 5(11) a favorable vote of 66.6% of such shares would be necessary.

While the Commission's certificates do not show it as a separate item, it is apparent that 6,383 of the 8,598 publicly held New Orleans shares were voted. Of these 6,067, or 95% voted for rejection of the Plan.

POSITION OF THESE PETITIONERS

Respondents, in an excess of zeal, have characterized petitioners as "apostles of delay" and "speculators." These epithets are not only a poor substitute for legal argument, but are entirely unjustified.

Petitioners acquired shares in New Orleans because they believed it to have the greatest earning potential of the debtor railroads. They invested in the hope of gain, and in this sense are "speculators," as are all other security holders in the debtor railroads.

The difficulties encountered by petitioners in these proceedings have arisen basically from the fact that the bankruptcy trustee and other proponents of the Plan have treated New Orleans as if it were a wholly owned subsidiary of Missouri Pacific. The conviction of the respondents that petitioners were *de minimis* and were not entitled to equitable consideration or protection of the law is strongly expressed in the briefs in opposition and has pervaded the entire proceedings. So far from attaining a strategic position in this reorganization, petitioners have been ruthlessly swept aside by the vast financial interests supporting the Plan, and have been totally unable to obtain recognition for the intrinsic value of their investment.

Petitioners have vigorously resisted this denial of their rights and have diligently pursued the legal remedies available to them. If the time necessarily consumed in the determination of the important issues presented by the Petition may be termed "delay," petitioners respectfully submit that it is not they, but the respondents who are its apostles.

In the last analysis the respondents' position is that for reasons of expedience the legal rights of petitioners should be disregarded.

CONCLUSION

Petitioners respectfully submit that their petition presents issues of grave national importance. The integrity and proper administration of the Interstate Commerce Act and the Bankruptcy Act transcend in importance the transient considerations of any individual case. The issues presented urgently require the determination of this Court. A writ of certiorari should issue.

Respectfully submitted,

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January 12, 1956.

Supreme Court, U. S.
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HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. 568

In the Matter of
MISSOURI PACIFIC RAILROAD COMPANY, Debtor.
MISSOURI PACIFIC RAILROAD COMPANY 5¼% SECURED SERIAL BONDHOLDERS COMMITTEE,
Petitioner,

v.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor, et al.,
Respondents.

BOLTON SULLIVAN and STEWART HUSTON, Independent Directors of Missouri Pacific Railroad Company,
Petitioners,

v.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Eighth Circuit.

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Summary of Argument.

I. Plan of Reorganization.

The Plan of Reorganization, including the merger therein contained, approved by the lower courts was not initiated, worked out or approved in accordance with the provisions of Section 5 of the Interstate Commerce Act, but was developed and imposed solely as part of a reorganization under Section 77 of the Bankruptcy Act. The Plan is therefore illegal.

This Court has already determined (in the **St. Joe** case) that, in general, mergers proposed as part of a Section 77 reorganization must meet the requirements of Section 5. There is no basis for departing from the general rule in these proceedings. The fact that both the corporations to be merged are in bankruptcy and may be "affiliated" is irrelevant. The language used by Congress in Section 5 and Section 77 is clear. There is no exception in either statute which exempts the merger here proposed from the need to comply with Section 5.

The Commission and the courts are without power to read into these statutes provisions for special treatment of the corporations here involved. Such action would violate established rules of statutory construction, would be an unjustifiable intrusion on the rights of the respective states to regulate their own corporations and would improperly destroy the rights of stockholders.

This court determined in the **St. Joe** case that railroads in bankruptcy "remain live and going concerns." Since this is so, their stockholders have the right to insist that any merger be voluntarily initiated and carried out in accordance with established statutory procedure, so that their rights may be fully protected. In the present instance, the debtor MOP neither initiated, worked out or

approved the merger in accordance with accepted corporate procedure.

II. Petitioners Stewart Huston and Bolton Sullivan.

These petitioners, called the Independent Directors of MOP, were duly admitted by the Commission as parties in interest in the proceedings held before it under Section 77 (d), out of which proceedings the Plan emerged. Since Section 77 (e) brigades the power of the courts and the Commission, conferring on the Commission the primary responsibility for developing a plan of reorganization, this action by the Commission is an umbrella which protects the Independent Directors from being challenged in the court proceedings dealing with the plan of reorganization. The finding by the Commission that these petitioners were interested parties with respect to the Plan is a finding of fact which cannot be disturbed by the courts. As interested parties, the petitioners cannot be deprived of their right to challenge the validity of the Plan in the very judicial proceedings established by Congress in Section 77 (e) for passing on the Plan.

None of the parties who objected to the participation by the Independent Directors in these judicial proceedings had the right to do so, since none had made use of the administrative remedy provided by the rules of the Commission.

The decision (which is the law of this case) that these petitioners had no right to appear before the courts on matters arising under Section 77 (a) and 77 (c) (13), which deal with matters solely within the jurisdiction of the courts, is not relevant in determining the rights of parties with respect to matters which are the primary responsibility of the Commission.

The Bankruptcy Act was intended to afford protection to minority groups. The Missouri constitutional provi-

sion for cumulative voting for corporate directors, pursuant to which the Independent Directors were originally elected, had the same purpose. If these purposes are to be realized, the courts, as did the Commission, must recognize the rights of these petitioners to participate in these proceedings.

The lower courts have disregarded the elaborate statutory scheme established by Congress for railroad reorganizations and their action in this case has resulted in distorting the carefully worked out allocation of power between Commission and court which Congress has enacted in Section 77.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. .....

In the Matter of
MISSOURI PACIFIC RAILROAD COMPANY, Debtor.
MISSOURI PACIFIC RAILROAD COMPANY 5¼% SECURED SERIAL BONDHOLDERS COMMITTEE,
Petitioner,

v.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor, et al.,
Respondents.

BOLTON SULLIVAN and STEWART HUSTON, Independent Directors of Missouri Pacific Railroad Company,
Petitioners,

v.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this cause.

OPINIONS BELOW.

The opinion of the District Court with respect to the approval of the Plan of Reorganization is dated February 25, 1955, and is reported in **In re Missouri Pacific Railroad Co.**, 129 F. Supp. 392 (E. D. Mo. 1955). This opinion is printed at pages 249 ff. of Volume V of the Record before the Court of Appeals.

The opinion of the District Court with respect to the confirmation of the Plan of Reorganization is dated September 19, 1955, and is reported in **In re Missouri Pacific Railroad Co.**, 135 F. Supp. 102 (E. D. Mo. 1955).

The opinion of the Court of Appeals with respect to the approval of the Plan of Reorganization is dated September 14, 1955, and is reported in **Missouri Pacific R. Co. 5¼% S. S. B. C. et al. v. Thompson et al.**, 225 F. 2d 761 (8th Cir. 1955). This opinion, and the judgments rendered in accordance therewith, are printed as Appendix AA to this Petition.

A petition for rehearing by the Court of Appeals was filed by petitioners Stewart Huston and Bolton Sullivan in the matter of the approval of the Plan of Reorganization and was denied by that Court on October 13, 1955. The petition is printed in Volume VI of the aforesaid Record.

JURISDICTION.

The judgment of the Court of Appeals with respect to the approval of the Plan of Reorganization was entered September 14, 1955.

Jurisdiction to issue the writ rests on Title 28, United States Code, Section 1254.

QUESTIONS PRESENTED.

I. The Plan of Reorganization.

The basic question with respect to the legality of the Plan of Reorganization is:

In proceedings under Section 77 of the Bankruptcy Act must a Plan of Reorganization of several affiliated railroad corporations which provides for the merger or consolidation of the debtors meet the standards of and be adopted pursuant to the provisions of Section 5 of the Interstate Commerce Act?

This question may be posed at any of several stages:*

(i) at the approval of the Plan by the Commission;

(ii) at the approval of the Plan by the Bankruptcy Court;

(iii) at the confirmation of the Plan by the Bankruptcy Court.

Petitioners herein have taken appropriate steps to object to any action approving or confirming the Plan at each of the above stages.

The question has two facets: (i) must a plan of reorganization be voluntarily initiated and worked out by the carriers to be merged and (ii) must a plan be submitted to stockholders for vote in accordance with the provisions of Section 5.

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* Stage (i) corresponds to step "Second" mentioned by Justice Douglas in his dissenting opinion in *St. Joe Paper Co. v. Atlantic Coast Line R. Co.*, 347 U. S. 298, 322 (1954), stage (ii) corresponds to "Fourth" and (iii) to "Ninth."

II. The Status of Petitioners Stewart Huston and Bolton Sullivan.

1. Does the final action by the Interstate Commerce Commission admitting these petitioners as parties in interest in the proceedings before the Commission held in accordance with Section 77 (d) of the Bankruptcy Act and out of which the Plan of Reorganization emerged, require that the petitioners be treated as parties in interest in the judicial proceedings, held in accordance with Section 77 (e) of that Act?

2. Do the cumulative voting provisions of the Constitution of Missouri, pursuant to which the petitioners were elected directors of the Missouri Pacific Railroad Company, entitle petitioners to recognition as parties in interest in the judicial proceedings with respect to the approval and confirmation of the Plan by the District Court in accordance with the provisions of Section 77 (e) of the Bankruptcy Act?

STATUTES INVOLVED.

The applicable sections of the Bankruptcy Act* provide, in part, as follows:

Subsection (b):

> "A plan of reorganization . . . (5) shall provide adequate means for the execution of the plan, which may include . . . the merger or consolidation of the debtor with another corporation or corporations . . . ."

Subsection (c) (13):

> "The debtor, any creditor or stockholder, or the duly authorized committee, attorney or agent of either . . . shall have the right to be heard on all questions arising in the proceedings, and, upon petition therefor, and cause shown, any such person or any other interested party may be permitted to intervene."

Subsection (d):

> "After the filing of such a plan (of reorganization, by the debtor or others), the Commission . . . shall, after due notice to all stockholders and creditors . . . hold public hearings, at which opportunity shall be given to any interested party to be heard. . . ."

Subsection (e):

> "Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest (and) . . . . shall, after notice in such manner as he (the judge) shall determine . . . hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment (as may have been

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* Bankruptcy Act, Sec. 77 . . . 49 Stat. 911 (1935), 11 U. S. C. Sec. 205.

filed). After such hearing . . . the judge shall approve (or disapprove) the plan . . . . (If approved, the) plan shall then be submitted by the Commission to the creditors . . . and stockholders (entitled to vote thereon) . . . for acceptance or rejection . . . . The Commission shall certify to the judge the results of such submission."

". . . .

"Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by . . . more than two-thirds (of each class voting thereon) . . . **Provided**, that, if the plan has not been so accepted . . . the judge may nevertheless confirm the plan, if he is satisfied and finds, after hearing, that it (is fair and equitable) . . . ."

Subsection (f):

"Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof . . . and all creditors. . . . Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the . . . consolidation or merger of the debtor's property . . . to the extent contemplated by the plan and not inconsistent with the provisions and purposes of (the Interstate Commerce Act). . . ."

The applicable sections of the Interstate Commerce Act* provide, in part, as follows:

Section 5 (2):

"(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)

---

* Interstate Commerce Act, Sec. 5 . . . 54 Stat. 905 (1940), 49 U. S. C. Sec. 5.

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership. . . .

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission. . . ."

Section 5 (11):

"The authority conferred by this section shall be exclusive and plenary, and any carrier . . . participating in . . . (a merger) shall have full power (with the assent, in the case of . . . a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect. . . ."

Louisiana Revised Statutes (1950), Title 12, Sec. 48, and Revised Statutes of the State of Missouri (1949), Sec. 351.410, 351.415, 351.420, 351.425 and 351.450, containing the law of these states with respect to corporate mergers are set forth in Appendix A.

Article 11, Sec. 6 of the Constitution of the State of Missouri (1945), which provides for cumulative voting for directors of Missouri corporations, is set forth in Appendix B.

STATEMENT OF THE CASE.

A. Background of the Reorganization.

The Missouri Pacific Railroad Company,* on March 31, 1933, filed a petition in bankruptcy under Section 77 of the Bankruptcy Act. Thereafter, New Orleans, Texas & Mexico Railway Company, International-Great Northern Railroad Company,** and some twenty-one other railroads included within the Missouri Pacific System filed petitions in bankruptcy. The petitions filed by NOTM and I-GN stated that each company desired "to effect a plan of reorganization in connection with or as a part of the plan of reorganization of" MOP.***

The petitions were duly filed in the United States District Court for the Eastern Judicial District of Missouri.† These proceedings, designated as "In re Missouri Pacific Railroad Reorganization, No. 6935" were thereupon commenced and have continued to date.

Subsequent to the filing of the bankruptcy petitions, the proceedings required by Section 77 (d) of the Bankruptcy Act were commenced before the Interstate Commerce

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* Hereafter referred to as MOP.

** Hereafter referred to as NOTM and IG-N, respectively. MOP, NOTM and I-GN are generally referred to as the principal debtors. These three, and the 21 other companies, comprise what is referred to in these proceedings as the Missouri Pacific System. In the interests of simplicity, the issues raised by this case are considered as they relate only to MOP, NOTM and I-GN, rather than all the companies included in the system.

*** Rec. Vol. V, p. 32. References to "Rec. Vol. ...." are to the record as printed for the Court of Appeals in the matter of the appeal from the approval of the Plan. A single record for all petitioners herein has been filed with this Court.

† Hereafter referred to as the Bankruptcy Court.

Commission.* During the years that followed, a number of plans of reorganization were submitted to the Commission by various parties, including MOP, certain of the bondholder interests, certain stockholder groups and the petitioners, Stewart Huston and Bolton Sullivan.**

As a result of hearings before the Commission, successive plans of reorganization of the debtors were certified by the Commission to the Bankruptcy Court in 1940, in 1944 and in 1949. Each plan was in its turn approved by the Court but none of the plans was ever put into effect and the bankruptcy proceedings have continued.

Each of the successive plans, as compared with its predecessor, provided for larger total capitalization and greater recognition of the rights of more junior security holders.***

Following the abandonment of the 1949 plan, additional hearings were held by the Commission. * * * Thereafter the Bureau of Finance of the Commission issued an examiners' proposed report, to which exceptions were filed by various parties including the Independent Directors and the Missouri Pacific Railroad Company 5¼% Secured Serial Bondholders Committee,† the petitioners herein. Subsequently, the Bankruptcy Trustee of the principal debtors,

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* Hereafter referred to as the Commission. The Commission proceedings are designated "Missouri Pacific Railroad Company Reorganization, Finance Docket 9918."

** Hereafter referred to as the Independent Directors.

*** The plans are dealt with in the following opinions of the Bankruptcy Court: *In re Missouri Pacific Railroad Co.*, 39 F. Supp. 436 (E. D. Mo. 1941); *Id.*, 50 F. Supp. 936 (E. D. Mo. 1943); *Id.*, 64 F. Supp. 64 (E. D. Mo. 1945); *Id.*, 93 F. Supp. 832 (E. D. Mo. 1950).

*** A chronology of events is found in Appendix C.

† This petitioner is referred to in these proceedings as the Cubbins Committee to distinguish it from another committee representing certain of these bondholders.

Guy A. Thompson, filed with the Commission a stipulation and agreement, executed by a majority of the parties in interest in these proceedings, which contained certain modifications of the plan of reorganization proposed in the examiners' report. The Commission thereafter issued its Seventh and Eighth Supplemental Reports and Orders, dated July 29, 1954, and November 9, 1954, respectively,* approving, with certain modifications, the plan contained in the examiners' proposed report as modified by the stipulation and agreement. The Commission then certified the Plan to the Bankruptcy Court. The Plan, referred to in these proceedings as the "Agreed System Plan" because of its acceptance by a majority of the parties in interest and its requirement that the principal debtors be merged or consolidated within a single company, was thereafter approved by the Bankruptcy Court. This approval followed hearings before that Court held December 15-17, 1954, at which the present petitioners appeared and filed objections to the Plan and claims for equitable treatment. The Plan was approved by the Court on February 25, 1955, and the petitioners duly appealed to the Court of Appeals.

While this appeal was pending, the Plan was, in accordance with Section 77 (e) of the Bankruptcy Act, submitted by the Commission to the security holders entitled to vote thereon. The Commission certified the results of the vote to the Bankruptcy Court on July 5 and July 19, 1955. It appeared from the certification of the Commission that by a vote of more than two-thirds in amount of those voting, the Plan had been accepted by all classes of security holders except the NOTM common stock and the Missouri Pacific Railroad Company 5¼% Secured Serial Bonds.**

Pursuant to Section 77 (e), the Bankruptcy Court held a hearing on confirmation of the Plan on July 21, 1955.

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* These reports and orders are set out in full in Rec. Vol. V, pp. 105 to 248.

** See Appendix E.

The present petitioners filed objections to the confirmation. The Independent Directors were not permitted to participate in the hearing on the ground that they were not parties in interest in the proceedings. The Bankruptcy Court found the Plan fair and equitable and that the rejection by the two classes of security holders was not justified. The Court invoked the so-called "cram-down" provision of Section 77 (e) of the Bankruptcy Act and on September 19, 1955, entered an order confirming the Plan. The petitioners duly appealed to the Court of Appeals.

Just prior to the Bankruptcy Court's order confirming the Plan, the Court of Appeals, on September 14, 1955, acted on the appeals from the lower court's order approving the Plan. The appeal of the Independent Directors was dismissed, the objections taken by the other appellants were overruled, and the order of the Bankruptcy Court approving the Plan was affirmed. The petition of the Independent Directors for rehearing was denied October 13, 1955.

B. Further Action With Respect to Confirmation of the Plan.

Petitioners and counsel for the Bankruptcy Trustee* filed with the Court of Appeals on November 18, 1955, a "Stipulation of Attorneys for Appellants and Appellees Re: Record on Appeals and Their Submission Without Argument."** This action was taken for the purpose of expediting the appeals of petitioners from the confirmation of the Plan in order that, following the action by the

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* The counsel for the Bankruptcy Trustee acted on behalf of the Trustee and such other of the respondents as "may desire to avail themselves of the understandings" contained in the Stipulation which was filed.

** The Stipulation is set forth in full in Appendix D. It is hereafter referred to as the Stipulation on Confirmation.

Court of Appeals on confirmation, the issues raised by that decision could be presented to this Court at the same time as the issues raised by the decision with respect to the approval of the Plan. The petitioners, in filing the Stipulation on Confirmation designated the record on appeal* and adopted the Statement of Points to be Relied Upon filed by them in the matter of the appeal from the approval of the Plan as their Statement of Points in the confirmation appeal. All the parties to the Stipulation on Confirmation agreed that the Court of Appeals might consider the briefs, answering briefs, reply briefs and oral arguments filed or made on the prior appeal as filed or made on the confirmation appeal.

The Stipulation on Confirmation was presented to the Court of Appeals by counsel for petitioners and counsel for the Bankruptcy Trustee, approved by that Court and duly filed. However, one of the appellants from the order of the Bankruptcy Court confirming the Plan did not sign the Stipulation on Confirmation, and for this reason the Court of Appeals was unable to act on the confirmation appeals prior to the expiration of 90 days from its decision in the matter of the approval of the Plan.

In view of the opinion of the Court of Appeals on approval of the Plan, and the substantial identity of the issues raised in that appeal and in the confirmation appeal, petitioners anticipate that the Court of Appeals, consistently with its prior action, will affirm the action of the Bankruptcy Court confirming the Plan.**

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* The Record included the record on the appeal from the action of the Bankruptcy Court approving the Plan and the transcript of the confirmation hearing, together with certain docket entries, notices of appeal and other similar material.

** So far as petitioners, the Independent Directors, are concerned it is anticipated that their appeal will be dismissed.

The only differences between the issues raised by the action of the lower courts in connection with the confirmation and the action in connection with the approval are that the confirmation comes at a later stage in the proceedings and that the Bankruptcy Court exercised its authority under the "cram-down" provision of Section 77 in confirming the Plan. In view of the finding by both the Bankruptcy Court and the Court of Appeals that Section 77 is the only statute which must be complied with in these proceedings, these differences do not appear to be such as would in any way affect the decision of the Court of Appeals.

If the action of the Court of Appeals on the confirmation of the Plan is as anticipated, petitioners will promptly prepare and present to this Court a petition for writ of certiorari in connection with the confirmation so that this Court may have the Plan before it both at the approval and confirmation stages of these proceedings.

C. The Principal Debtors.

MOP is a Missouri corporation and the dominant company in the Missouri Pacific System. It has presently outstanding over 700,000 shares of preferred stock and over 810,000 shares of common stock. The preferred stock is listed on the New York Stock Exchange. Approximately one-half of the MOP common stock is owned by Alleghany Corporation. MOP operates directly or by wholly owned subsidiaries over 6900 miles of railroad in the southwestern states.

NOTM is a Louisiana corporation. It has 148,329 shares of stock outstanding of which 139,731 shares are owned by MOP. 121,460 shares of this block, however, are pledged as collateral for the Missouri Pacific 5¼% Secured Serial Bonds and are recorded on the NOTM books in the name

of the Indenture Trustee for these bonds. The Indenture Trustee has from time to time given proxies to vote the stock to the MOP Bankruptcy Trustee. The bonds are in default. 8,598 shares of the NOTM stock are publicly held. NOTM and its subsidiaries operate over 2800 miles of railroad.

The third of the principal debtors is I-GN, which is one of the wholly owned subsidiaries of NOTM. It operates approximately 1100 miles of railroad. I-GN debt is publicly held.

Each of the principal debtors maintains separate books of account and financial and operating records. Each files separate reports of operations with the Commission. Each has its own board of directors, holds meetings of stockholders and the separate corporate identity of each has been maintained. The three operate, however, as the Missouri Pacific System.*

D. **The Agreed System Plan.**

The Agreed System Plan developed out of the hearings held before the Commission in May, 1953. At these hearings there was substantial disagreement between the parties there represented, although, except for the plan of reorganization proposed by the Independent Directors, the plans proposed provided for the merger or consolidation of the principal debtors.

On January 8, 1954, the Bankruptcy Court entered an order directing the Bankruptcy Trustee to cooperate with and assist the parties in composing their differences. In the period preceding and following the issuance of the

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* The Seventh Supplemental Report of the Commission (Rec. Vol V, pp. 105 ff.) contains a detailed description of the debtors and their properties.

examiners' proposed report negotiations took place which resulted in the filing on May 12, 1954 by the Bankruptcy Trustee of a stipulation and agreement signed by the major parties in interest other than the petitioners. This stipulation contained the Agreed System Plan which modified in certain respects the plan contained in the examiners' proposed report. With certain modifications, the plan was approved by the Commission and filed with the Bankruptcy Court in accordance with Section 77.

The Plan provides for the merger or consolidation of the principal debtors and the issuance of securities in a new or reorganized company in the place of the presently outstanding securities. Holders of the present MOP preferred stock will receive 1,856,528 shares of new Class A common, and holders of the present MOP common stock will receive 40,657 shares of new Class B stock. Public holders of the present NOTM stock will receive various debt securities in the new corporation.

E. Petitioners Stewart Huston and Bolton Sullivan.

The petitioners are two of the fifteen members of the MOP Board of Directors. Since MOP is a Missouri corporation, its directors are elected by cumulative voting. Both Mr. Sullivan and Mr. Huston were originally elected over the opposition of Alleghany Corporation, the dominant MOP stockholder. In 1947, three years after the first Independent Directors were elected, Mr. Sullivan and two other directors elected with him duly filed a petition requesting that they be permitted to intervene in the proceedings before the Commission.* By an order dated October 24, 1947, the petition was granted by the Commission

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* The petition and the Commission's order thereon are set out in full in Rec. Vol. I, pp. 14 ff.

> ". . . after consideration of the record in the above entitled proceedings and of the petition . . . ."

and it was ordered that

> "The petitioners be and they are hereby permitted to intervene and be treated as parties hereto."

Following the election of Mr. Huston, the Commission, on February 5, 1953, entered an order substituting him for a prior Independent Director.*

From the time of the order of October 24, 1947, the petitioners have participated in all proceedings before the Commission dealing with the MOP reorganization. They have filed suggested plans of reorganization, presented testimony, examined witnesses, filed briefs and other documents and been active in pressing their claims and position before the Commission. From their first participation in the proceedings, the Independent Directors have opposed the forfeiture of MOP stockholders' rights and have urged the preservation of the existing corporate structures and separate reorganizations of each of the three principal debtors.

The orders of the Commission of October 24, 1947 and February 5, 1953, have never been challenged by any party before the Commission, nor has there been any change in the status of or the position taken by the Independent Directors since 1947.

In 1954, the Independent Directors appeared before the Bankruptcy Court and opposed the payment of certain interest coupons on the MOP First Mortgage Bonds. This matter was before the Court as one of the administrative matters over which the Bankruptcy Court, but not the Commission, has jurisdiction. The Bankruptcy Court ruled

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* This order is set out in full in Rec. Vol. I, pp. 22-3.

that the Independent Directors were not entitled to participate in the matter under consideration. On appeal to the Court of Appeals, the appeal was dismissed.* The Independent Directors now make no contention that they have the right to intervene in matters arising under subsections (a) and (c) (13) of Section 77.

BASIS OF FEDERAL JURISDICTION.

Federal jurisdiction in the court of first instance derives from the fact that the proceedings arise under Section 77 of the Bankruptcy Act.

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* *Huston et al. v. Thompson*, 217 F. 2d 308 (8th Cir. 1954).

ARGUMENT.

Preface.

The basis for the granting of this petition can be simply stated. This Court, in the St. Joe case, after an exhaustive examination of the congressional history and a careful study of the statutory language, concluded that the consistency clause in Section 77 of the Bankruptcy Act made it mandatory to comply with all of the provisions of Section 5 of the Interstate Commerce Act in any Section 77 proceeding involving the merger of two or more railroad companies. This case is a Section 77 proceeding involving the merger of MOP and NOTM. It is admitted that there has not been compliance with all of the procedural requirements of Section 5. Therefore, there is a conflict with the rationale of the St. Joe case. We respectfully submit that it is the duty of this Court to adjudicate said conflict.

I. The Plan of Reorganization Is Legally Defective.

A. The Issue.

These reorganization proceedings involve one of the great railroad systems of the country. Together, the three principal debtors operate over 10,000 miles of railroad. Their total assets approach one billion dollars. In eleven states the Missouri Pacific System plays a major—if not dominant—role in public transportation.

The proceedings have been aptly characterized as "long-drawn-out";* it is important that these railroad properties

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* *Chemical Bank & Trust Co., Trustee, v. Group of Institutional Investors*, 343 U. S. 982 (1952); Memorandum of Mr. Justice Frankfurter in connection with the denial of the petitions for writs of certiorari.

be returned to private control. But it is even more important that any plan of reorganization pursuant to which the debtors are discharged from bankruptcy meet the requirements of law. The present plan does not.

Put at issue by the lower court decision in this case is the power granted by Congress to the Interstate Commerce Commission by Section 77 of the Bankruptcy Act and Section 5 of the Interstate Commerce Act.* The issues raised herein require this court to interpret these two acts of Congress, to define the relation between them, and to apply to the facts here presented the law laid down by this Court in **St. Joe Paper Co. et al. v. Atlantic Coast Line R. Co.**, 347 U. S. 298 (1954).**

In his memorandum statement cited above, when another plan of reorganization for these debtors was before this Court, Justice Frankfurter prophetically remarked:

> "If (the plan of reorganization is) carried to the stage of confirmation by the lower courts, review may again be sought here, perhaps with the benefit of additional light."***

A new plan of reorganization has been approved and confirmed and review is now being sought with the benefit of the light thrown on the Commission's power by the decision in the **St. Joe** case.

B. The Plan of Reorganization is in conflict with this Court's opinion in the **St. Joe** case.

It was established by the decision in the **St. Joe** case that the so-called "consistency clause" of Section 77 [sub-

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* Hereafter referred to as Section 77 and Section 5, respectively.

** Hereafter referred to as the *St. Joe* case.

*** *Chemical Bank & Trust Co., Trustee, v. Group of Institutional Investors*, 343 U. S. 982, 983.

section 77 (f)] requires that mergers between previously unaffiliated railroads which are to be consummated as part of a plan of reorganization in bankruptcy meet all the standards and requirements of Section 5. While this decision delineates the nature of the relation between these two Acts, and the restrictions imposed by them on the power of the Commission in the general field of mergers in the course of bankruptcy proceedings, the specific question presented by these proceedings was not there passed upon. The Court, speaking through Justice Frankfurter, stated in that case:

> "In all the reported cases of reorganizations involving mergers, the merger was either proposed by the debtor in conjunction with the other party, or the merger involved a parent and its subsidiaries and was treated essentially as an internal reorganization. In any event, we are not now called upon to pass on the validity of the latter type of merger." (Note 12, p. 309)

Whether it can be fairly said that MOP and NOTM are parent and subsidiary,* in view of the fact that the NOTM stock owned by MOP was pledged under the MOP 5¼% Secured Serial Bonds Indenture and stands in the name of, and is voted by, the Indenture Trustee, is open to serious doubt. It should be noted in this connection that, for voting purposes, the Commission does not treat MOP as the owner of the NOTM stock pledged with the Indenture Trustee. In Footnote 1 to Table No. 1 of the Certificate of Vote (printed herewith as Appendix E) the Commission states:

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* The proposed merger of I-GN raises the same problems as the merger of NOTM and MOP. Under the Plan, however, it is possible that I-GN may be reorganized as a separate company; in any event, if the Plan is invalid as to MOP, it must fail. For these reasons, no further discussion will be devoted to I-GN.

"Each $1,000 bond voted in class 19 (MOP 5¼% secured serial bonds) has been counted as a vote in Class 3 (NOTM capital stock) for 10 shares of stock."

From this de facto recognition that MOP is not the real owner of some 120,000 shares—approximately 80%—of the NOTM stock, the conclusion may be drawn that there is not, and cannot be, a parent subsidiary relationship between the two corporations. If the two corporations are not related, the decisions of the lower courts approving and confirming the Plan are in direct conflict with this Court's opinion in the **St. Joe** case. If the two are considered as related or affiliated corporations,* the issue which this Court noted as unresolved in the **St. Joe** case is here squarely presented for decision.

There are only two basic differences between the facts presented here and those with which this Court dealt in the **St. Joe** case. Here, the carriers to be merged are both in bankruptcy and are affiliated; there, only one was in bankruptcy and the carriers were not affiliated. Neither of these differences alters the application of the rules and standards laid down in the **St. Joe** case. The present MOP Plan has the same "congenital defect"** as the plan of reorganization of Florida East Coast.

C. Mergers between affiliated corporations and mergers between corporations having no prior connection with one another are equally covered by the language of Section 5 and Section 77.

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* In the interests of brevity, the term "affiliated corporations" will be used hereafter to describe the MOP-NOTM relationship, whether it be a "parental" one or some more distant relationship.

** *St. Joe* case, p. 314.

1. Section 5.

The Commission, from an early date, has specifically and consistently held that mergers between affiliated corporations must meet all the standards and requirements of Section 5. This natural and logical result of a reading of Section 5 was noted by the Commission in **Southwestern Lines Unification,** 124 I. C. C. 401, 429-30 (1927), in the following language:

> "It would also seem that whether a project of this kind (merger) is fair and of mutual advantage ought to be considered both by the directors and by the stockholders of the corporations concerned, unaffected by any relation of control or ownership possessed by one of those corporations."

In case after case, the Commission has noted that mergers proposed between affiliated corporations were accompanied by proof of compliance with the terms of Section 5, including the voting procedures established by state law.

Gulf, Mobile & Ohio Railroad Company Purchase, 275 I. C. C. 197 (1949);

Pere Marquette Railway Company Merger, etc., 267 I. C. C. 207 (1947);

Elgin, Joliet & Eastern Railway Company Merger, 230 I. C. C. 431 (1938);

Cleveland, Cincinnati, Chicago & St. Louis Railway Company et al. Merger, etc., 228 I. C. C. 240 (1938);

Louisville & Nashville Railroad Company Acquisition, 212 I. C. C. 210 (1936).

2. Section 77.

Just as Section 5 applies to all mergers without exception, the consistency clause of Section 77 applies to all plans of reorganization developed thereunder. There is

not a word in the statute which limits the application of the consistency clause to those mergers which are between unaffiliated corporations. It is, on the contrary, clear that every plan of reorganization must meet the requirements of Section 5 if any action is proposed to be taken which falls within the ambit of Section 5. As this Court stated in the **St. Joe** case:

> "The permissive merger provision in plans of reorganization was thus (by the 'consistency clause') made expressly conditional on compliance with the requirements of §§ 1 and 5 of the Interstate Commerce Act . . . .
>
> "All this of course is not to say that mergers cannot be carried out in the course of a § 77 reorganization. It merely means that if they are, they must be consummated in accordance with all the requirements and restrictions applicable to mergers under . . . the Interstate Commerce Act . . . .
>
> "This essential prerequisite for a merger between . . . two existing corporate entities—must be complied with even if one of these carriers is in § 77 proceedings . . . .
>
> "The legislative incorporation of § 5 into § 77 should not result in its judicial mutilation." (pp. 303 ff.)

3. The relation between Section 5 and Section 77.

The **St. Joe** case made it clear that Congress had deliberately prohibited involuntary mergers. The case of **Schwabacher v. United States**, 334 U. S. 182 (1948), made it clear that voluntary mergers must conform to the provisions of the Interstate Commerce Act.

In the **Schwabacher** case, the court said:

> " . . . in passing on a voluntary merger (the Commission must look) only to the Interstate Commerce

> Act. In matters within its scope it is the supreme law of the land. Its purpose to bring within its scope everything pertaining to the capital structures of such mergers could hardly be made more plain." (p. 198)

The vital difference between Section 77, where the Commission, as "chief architect of any plan of reorganization," "must originate"* or "formulate" the plan and has the power "to coerce its adoption,"** and Section 5, which anticipates voluntary mergers, with the freely given assent of stockholders in accordance with the laws of the respective states of incorporation, must be maintained. The Commission, however desirable it may believe a merger to be, has no power to impose a merger on stockholders. Justice Frankfurter stated in his memorandum opinion when these proceedings were before this Court in 1952:***

> "But as the matter stands, two great questions are in controversy; they are questions for which the Congress has not authorized the Interstate Commerce Commission to give final answers. . . . (The second question is posed by the fact that the) Commission's plan also eliminates existing corporations and directs financial power into new channels."

Under the decision in the **St. Joe** case, a Section 77 plan of reorganization may eliminate existing corporations and direct financial power into new channels, but it must do so "in accordance with all the requirements and restrictions applicable to mergers under" the Interstate Commerce Act. This result is in accordance with rules of law which have many times been affirmed by this Court.

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* *St. Joe* case, p. 322, dissenting opinion of Justice Douglas.

** *Schwabacher v. United States*, 334 U. S. 182, 206, dissenting opinion of Justice Frankfurter.

*** *Chemical Bank & Trust Co. v. Group of Institutional Investors*, 343 U. S. 982, 983.

D. The action by the Bankruptcy Court with respect to the Plan violated established rules of statutory construction.

The language of both Section 5 and Section 77 is clear. Whether the Commission or the lower courts agree with the policy there expressed is irrelevant. The function of the courts (and, of course, of administrative bodies)

> " . . . is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort." **62 Cases of Jam v. United States**, 340 U. S. 593, 596 (1951).

As this Court has said:

> "It is not for us then to try to avoid the conclusion that Congress did not mean what it said. Arguments of policy are relevant when for example a statute has an hiatus . . . or there are ambiguities in the legislative language. . . . But when Congress, though perhaps mistakenly or inadvertently, has (spoken) . . . its word is final—save for questions of constitutional power."
>
> **Unexcelled Chemical Corp. v. United States**, 345 U. S. 59, 64 (1953).

There is neither an hiatus nor an ambiguity in Section 5 or Section 77. Compliance with Section 5, insofar as the merger proposed in the Plan is concerned, imposes no hardship and causes no difficulties. In the present case, submission of the Plan to stockholders' meetings for their approval of the merger provisions in accordance with state law, will be according to stockholders, whose stock has a very substantial value in the eyes of the Commission, simply the rights which Congress directed should be given

them.* Stockholders have the right to determine at stockholders' meetings held pursuant to state law whether they desire to accept an interest in a new and different corporation in place of their interest in their present corporation.**

A further protection accorded to stockholders by Congress has been overlooked by the Commission and the lower courts in these proceedings. In the attempt to implement the Plan without complying with Section 5 or the provisions of state law which are incorporated therein, the Commission and lower courts have neglected the policies laid down by this Court in earlier cases with respect to the recognition due to state legislation. This Court, speaking through Chief Justice Hughes, has said:

> ". . . the Congress may circumscribe its regulation and occupy a limited field . . . the intention to supersede the exercise by the state of its authority as to matters not covered by the Federal legislation is not to be implied unless the act of Congress fairly interpreted is in conflict with the law of the state."
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> **Atchison, Topeka & Santa Fe Railway Co. v. Railroad Commission,** 283 U. S. 380, 392-393 (1931).

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* Whether a different result should be reached if the stock of the corporations to be merged had been declared worthless and not entitled to recognition on reorganization is not relevant here. The Commission's Plan, at a stated $100 per share, gives present MOP common and preferred stockholders almost $190,000,000 of equity in the new company. (See table of distribution of securities, made a part of the decision of the Bankruptcy Court approving the Plan, *In re Missouri Pacific Railroad Company*, 129 F. Supp. 392, 403.)

** Once the turn-over order has been issued by the Bankruptcy Court, the old stockholders will be confronted with an accomplished plan and their stock will have been transmuted into that of another corporation. No legal legerdemain then could put Humpty Dumpty together again.

There is no conflict between Section 77 and Section 5 which makes it necessary to override the declared policy of Missouri and Louisiana with respect to mergers of corporations created under their laws. It is not within the framework of the Federal system that state laws and state policy be lightly disregarded for the mere convenience of the administrative body. The traditional power of the states is entitled to protection from this Court. Dealing with a problem similar to the one here presented, this Court stated, in **Palmer v. Massachusetts**, 308 U. S. 79 (1939):

> "But such absorption of state authority is a delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions. Therefore, in construing legislation this court has disfavored inroads by implication on state authority. . . ." (p. 84)

In his dissenting opinion in **Schwabacher v. United States**, 334 U. S. 182, Justice Frankfurter says:

> "One of the vital consequences of incorporation in a given State is the subjection of the relationship between stockholders and their corporation to the law of that State, except insofar as federal law unmistakably overrides it. . . .
>
> ". . . the Court is depriving the States of a measure of control over their own corporations when this is not required by a fair reading of the Transportation Act, and although the survival of such State law does not interfere with the national interest as found by the agency selected by Congress for determining that interest."* (pp. 208-210)

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* The Commission has held no hearing in these proceedings on the question of whether the national interest would be interfered with if Section 5 were to apply to the Plan.

Far from "unmistakably overriding" the law of the state, the consistency clause of Section 77 specifically requires that law to be adhered to when mergers are to be imposed. This requirement both the Commission and the Bankruptcy Court have ignored.

E. The Plan violates the rights given to stockholders under state law.

The laws of Missouri and Louisiana with respect to mergers are set out in Appendix A. Briefly, these laws provide that mergers must be passed upon at stockholders' meetings duly called for the purpose and must be approved by a two-thirds vote of the stock entitled to vote thereon. The vote of security holders provided for under Section 77 is entirely different, both in principle and in the procedure followed.

The Section 77 vote is intended primarily for securing from creditors their assent to alterations in the amount of their claims against a debtor. These creditors are interested in obtaining the maximum security for a money claim of a fixed and determined amount. Whether they are ultimately paid by corporation X or corporation Y does not concern them. Stockholders, on the other hand, are the owners of the corporation. Their interest will never be paid; whether a stockholder owns stock in corporation X or corporation Y is of great importance to him since the ultimate earning power of the company belongs to the stockholders. Creditors seldom if ever vote on corporate matters. They do not vote, as do stockholders, at formal meetings under long established and well defined procedures. Even more important than the difference in method, however, is the difference in the percentage of assents required in Section 77 creditor proceedings and that established for stockholder votes by Section 5. Under Section 77, each class of security holders is governed

by two-thirds in amount of those voting. Under Section 5 (and the laws of Missouri and Louisiana) stockholders can take corporate action to merge only by a vote of two-thirds of all stockholders entitled to vote.*

Corporations are persons, who take action in certain defined and established ways. Incorporation within a state creates a personality, a personality which, although it is a fiction,

> ". . . is a fiction created by law with intent that it should be acted on as if true."
>
> **Klein v. Board of Tax Supervisors**, 282 U. S. 19, 24 (1930); see **United States v. Milwaukee Refrigerator Transit Co. et al.**, 142 Fed. 247 (C. C. Wis. 1905).

The fact of incorporation clothes the stockholders with certain rights, one of which is that stockholders will take action affecting other stockholders, and will act in their corporate capacity, only at duly held stockholders' meetings. A stockholder may express an opinion at any time; he can take corporate action only by complying with the law governing his corporation.** While these restraints on voting by stockholders may be simply "procedural" ones,*** they are none the less real and entitled to protection.

This Court has many times declared that procedural safeguards cannot be casually dismissed. Whether found

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* The importance of this difference is demonstrated by the vote on confirmation by MOP stockholders. Over 95% of the stock which voted was voted "yes," but considerably less than two-thirds of the total stock entitled to vote was so voted.

** *Omaha National Bank v. Commissioner of Internal Revenue*, 183 F. 2d 899 (8th Cir. 1950).

*** Eighth Supplemental Report of the Commission (Rec. Vol. V, p. 247).

in the Bill of Rights, Congressional enactments or state statutes they must be observed. This Court stated in **Joint Anti-Fascist Refugee Committee v. McGrath et al.,** 341 U. S. 123 (1951):

> "It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under the law." (p. 179)

By the consistency clause, Congress incorporated in Section 77 the procedural safeguards with respect to mergers that were contained in Section 5. These safeguards must be preserved equally by the administrative agencies and by the Courts.

F. The exception read into Section 77 by the Commission and the lower courts will make that Act ambiguous.

The limitation of the decision of the **St. Joe** case so that it does not apply to mergers of affiliated corporations will require the incorporation into Section 5 and Section 77 of an exception which will raise a host of vexing problems. If only mergers of "affiliated" corporations are permitted without reference to Section 5, the Commission and the courts are confronted with the necessity of determining just what this elusive concept (nowhere spelled out in pertinent statutory or case law) means when applied to each particular set of facts. Every variation in an essential fact will pose another issue for this Court's ultimate determination.* The persons to be affected by legislation

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* For example, as already pointed out, the relation between MOP and NOTM is complicated by the fact that legal title to, and actual control over, more than 80% of the NOTM stock is vested with an Indenture Trustee. Such a situation might never arise again—and

have the right to a reasonably clear and unambiguous statute, not one fraught with uncertainties.

Irvine v. California, 347 U. S. 128 (1954);
United States v. Cardiff, 344 U. S. 174 (1952).

G. The Commission and the lower courts have overlooked the meaning of this Court's statement in the **St. Joe** case that the corporate identity of the debtor corporation is maintained throughout bankruptcy.

The corporate merger powers rest, under the laws of Missouri and Louisiana, with the stockholders.* While any plan of merger, of course, will be first developed under the authority of the Board of Directors for submission to the stockholders it is ineffective until duly approved by them. Since a railroad in bankruptcy "is not a defunct organism but remains a live and going concern,"** it is evident that only the stockholders of such a corporation could ultimately bind it to merge with another. The stockholders, as "those who wield the corporate merger powers" in the absence of Section 77, must wield them with respect to mergers proposed as a part of Section 77 proceedings.

The specific finding of the Bankruptcy Court that no stockholder assent to the Plan had taken place,*** is in itself proof of the Plan's illegality.

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this case would, therefore, probably be of little assistance in defining "affiliated" companies for general usage. The difficulties of establishing a generally applicable rule would be almost insurmountable.

* These statutes are set out in Appendix A.

** *St. Joe* case, p. 310.

*** ". . . even if the requirements of Section 5 must be complied with in this case, I am of the opinion that under all the circumstances . . . they have been complied with insofar as possible in this case. This does not mean that I conclude that the stockholder assent has taken place." *In re Missouri Pacific Railroad Co.*, 129 F. Supp. 392, 402. As already pointed out, the submission to stockholders under Section 77 of a plan of reorganization and their vote thereon cannot satisfy the requirements of a stockholders' vote on a merger.

While the opinion of the Bankruptcy Court approving the Plan leaves some doubt as to whether the Court believes that MOP (and NOTM) stockholders should be permitted to vote on the merger at stockholders' meetings held in accordance with Section 5,* this doubt is removed by the opinion on confirmation in which the Bankruptcy Court states:

> "(2) The Plan for Debtor Companies herein provides for the merger or consolidation of said Companies and meets the requirements of law in that respect.
>
> "(5) The Plan . . . satisfies all of the requirements of Section 77 . . . and all steps necessary to be taken in connection therewith by the Commission and this Court, Debtor Companies, their Trustee, and all other persons, have been taken and performed in . . . full conformity with all requirements of Section 77 and all other applicable law."**

The Bankruptcy Court has made it clear that no vote by stockholders is going to be taken, and that Court now stands upon the proposition that no compliance with Section 5 is necessary.

H. The Plan was not voluntarily initiated by the carriers to be merged.

The development of the present Plan, as is true of all plans of reorganization in bankruptcy, was basically a Commission responsibility. In fact, as the reports of the Commission disclose, the Plan is, with relatively minor modifi-

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* *In re Missouri Pacific Railroad Company,* 129 F. Supp. 392, 402:

> "In fact, the provisions of Section 77 requiring the plan to be submitted to the various classes of claimants after approval support the view that the shareholders should *not yet* have had the plan submitted to them for approval." (Emphasis supplied.)

** *Ibid.* 135 F. Supp 102, 105

cations, the plan proposed in the examiners' proposed report. The Commission refers to the "essential similarity"* of the two plans, the fact that the capital structure of the Agreed System Plan was "substantially within the framework of the plan recommended" in the examiners' report and that "the allocations of new securities are not greatly changed, and the distribution of cash remains approximately the same" as in the examiners' plan.**

The Commission makes much of the fact that the original plans of reorganization filed by the Debtors in 1936 proposed a merger of the principal debtors*** and that all subsequent plans approved by the Commission have so provided. The Commission overlooks the fact that these earlier plans (for example, the Commission's 1949 Plan) declared the MOP stock worthless and that a tremendous change in conditions in the railroad industry has taken place in the past 20 years.†

Moreover, whatever may have been done in 1936, the subsequent actions by the Debtor are of controlling significance. In May, 1954, the Debtor MOP stated in the Exceptions‡ filed to the examiners' proposed report with the Interstate Commerce Commission:

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* Rec. Vol. V, p. 106.

** Rec. Vol. V, p. 116.

*** Rec. Vol. V, p. 218.

† A comparison of the various decisions of the Bankruptcy Court discloses how faulty the earlier Commission plans were, the extent to which the forfeitures proposed therein were needless and the injustices which would have followed their implementation. It may be that the forfeitures in the present Plan are equally unnecessary.

‡ "Exceptions of the Missouri Pacific Railroad Company, Debtor, to the Proposed Report of Messrs. Boyden and Kirby. Due Date May 3, 1954," filed with the Interstate Commerce Commission in these proceedings.

"Debtor, representing present stockholders, hereby rescinds and withdraws any plans, agreements or statements heretofore made for, in favor of, or in support of, a reorganization in which one or more railroads is merged or consolidated with the Debtor, or in which the Debtor would become a part of a consolidated system reorganization. . . . (p. 2)

". . . both the 1949 system plan and the Examiners' modified plan are invalid under the statute. These plans were not proposed by and they do not have the approval of the Debtor. . . ." (p. 4)

"The Debtor favors a separate reorganization." (p. 89)

The Debtor's position was made even clearer when on May 12, 1954, the MOP Bankruptcy Trustee filed with the Commission the so-called stipulation and agreement presenting the Agreed System Plan. The letter of assent appended to the stipulation, and signed by T. C. Davis, Chairman of the Board of MOP, stated:

"By signing this Stipulation, the Debtor does not initiate or propose a merger . . . ."*

The role of the Debtor MOP in developing the Plan was also brought out in the December, 1954, hearings before the Bankruptcy Court on approval of the Plan. The MOP Bankruptcy Trustee, Mr. Thompson, testified in those hearings, and the following colloquy took place:

"Mr. Thompson: Now, that just in general, your Honor, is a report of what I have done, what we have done to carry out your plan, your order and direction to me.

The Court: My order and your plan.

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* Rec. Vol. 1-A. Stipulation and Agreement, Agreed System Plan, designated as "Trustee's Exhibits 1-17," following page 19 thereof. The Stipulation and Agreement is indexed as Trustee's Exhibits 3-A - 3-II inclusive.

> The Witness: Well, what was done was done under your order, and I want to say that from my own standpoint the services and assistance and the resourcefulness and knowledge of Senator Dearmont and Mr. Neff and Mr. Peet and Mr. Railey (officers of the Trustee) were just invaluable, and I want to give them full credit rather than myself for what has been accomplished." (Rec. Vol. I, pp. 72 ff.)

Somewhat later, Senator Dearmont, as counsel for Mr. Thompson, filed a brief with the Commission following hearings on allowances. At the hearings, counsel for Debtor MOP stated that the Plan was a "product of Debtor and its counsel." Senator Dearmont's brief states:

> "This (statement) is . . . an illustration of the utter lack of reliability in factual references made by . . . (counsel for the Debtor)."*

In the light of these facts, it seems clear that it was impossible for MOP to have initiated the merger contained in the present Plan when such initiation—and indeed the idea of merger itself—was specifically denied only 9 days prior to the filing of the Plan with the Commission.

The Plan approved and confirmed by the lower courts is inconsistent with the provisions of Section 5 of the Interstate Commerce Act, by which it must be judged. The granting of this petition will enable this Court to establish conclusively the relation between Section 5 and Section 77, will lead to the development and implementation of a legal plan of reorganization and assist in bringing these "long-drawn-out" proceedings to a proper termination.

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* "Brief of Trustee for Debtor Companies," dated June 15, 1955. Present petitioners took no part in the formulation of the Agreed System Plan. These remarks are cited as the opinion of one who, according to Mr. Thompson's testimony, took a major role in the development of the Plan.

II. The Independent Directors Were Improperly Denied the Right to Participate in the Judicial Proceedings With Respect to the Plan.

The refusal by the Bankruptcy Court and the Court of Appeals to allow the Independent Directors to participate in the judicial proceedings in which those courts both approved and confirmed the Plan raises important questions of administrative law and of the respective roles played by the courts and the Commission in developing and passing on plans of reorganization.

A. As parties in interest in the Commission proceedings, the Independent Directors are entitled to participate in the Court proceedings.

1. The language of Section 77 requires the Court to allow participation by the Independent Directors.

Section 77 establishes an "elaborate statutory scheme"* which governs the Commission and the courts in dealing with bankrupt railroad corporations. Upon the filing of the bankruptcy petition the corporate properties come under the jurisdiction of the court; concurrently, the responsibility for developing a plan of reorganization of the corporation is vested in the Commission. The court's function, with respect to the debtor's property, is the traditional one of control;** with respect to the plan of reorganization it is to ensure that the plan complies with established legal standards; the primary responsibility for the plan, however, rests with the Commission.*** With respect to the plan of reorganization, the court acts,

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* *St. Joe* case, p. 303.

** *Palmer v. Massachusetts*, 308 U. S. 79, 86. This power is conferred by Section 77 (a) of the Bankruptcy Act.

*** *Ecker v. Western Pacific R. Corp.*, 318 U. S. 448 (1943).

". . . only upon the issues specifically delegated by subsection (e). As to these its powers are negative . . . . (The court) becomes a necessary and important factor in railroad reorganization. These reorganizations may be attained only through properly coordinated action between the Commission and the court."*

Subsection (e), which joins together the process and procedures of the court and Commission, requires that the court "give due notice to all parties in interest," and thereafter hold a hearing at which such parties may appear and be heard upon the plan of reorganization which the Commission has developed and approved. As this Court said in the **Ecker** case, these are hearings

". . . at which all interested parties may appear. (And at which) additional evidence of opponents and proponents of the plan may be received . . . ." (p. 471)

The Commission, before whom the "opponents and proponents" of the plan originally appear, must, under Section 77 (d), hold hearings at which "any interested party" shall be heard. Of necessity, therefore, the Commission must make the original determination of those who are to be treated as interested parties, those who, as such, are to be permitted to appear and participate as opponents or proponents of a plan of reorganization. This the Commission did in the present proceedings. In 1947, upon a duly presented petition, and acting "upon consideration of the record" in the proceedings,** the Commission "ordered" that the Independent Directors

". . . be, and they are hereby permitted to intervene and be treated as parties hereto;"

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* *Id.*, at 474, 5.

** The petition and order are found at pp. 14-23 of Rec. Vol. I.

This Court cannot permit the Bankruptcy Court to pick and choose among the "interested parties" when the hearings under subsection (e) with respect to the court approval of the plan of reorganization are being held before it. Section 77 established a carefully worked out and orderly procedure for the development and scrutiny of reorganization plans. The procedure will be reduced to chaos if the junior partner—the bankruptcy court—is permitted to exclude from the hearings it holds on the plan, interested parties who have actively participated in the proceedings out of which the plan grew. The finding by the Commission that the Independent Directors are interested parties is an umbrella under which they have the right to participate in every part of the proceedings which relate to the plan of reorganization.

The Courts have often recognized the Congressional policy which lies behind Section 77. It was intended to remove the great injustices of the old equity-type railroad receivership,* and to prevent a small coterie of closely allied interests from dominating railroad reorganizations. As the Court of Appeals for the Second Circuit stated in **In re New York, New Haven & Hartford R. Co.**, 147 F. 2d 40, 49 (2nd Cir. 1945):

> "One of the purposes of Section 77 was to do away with . . . the customary practice of submitting to the court a plan already consented to by a large proportion of the old security holders and thus exerting pressure on the court to approve it against objections of minorities . . . ."

2. Findings of fact by administrative bodies cannot be disturbed by the courts.

The Commission, by admitting the Independent Directors as parties to these proceedings, intended to and did

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* *Palmer v. Massachusetts*, 308 U. S. 79, 85-87 (1939).

admit to participation a minority group opposed to and opposed by the majority of the Board and the dominant stockholder. This decision of the Commission that the public interest as well as private interests would be served by the participation of the Independent Directors is not subject to review by the Bankruptcy Court. It is a finding peculiarly within the province of the Commission, for it reflects directly on the plan of reorganization itself which is basically a Commission, not a court, responsibility.

The order by the Commission permitting the Independent Directors to intervene is a "finding by the Commission that the(y) . . . have an interest."*

Rule 19 of the Rules of Practice of the Commission** provides that recitals of material facts contained in a petition for leave to intervene, and not specifically denied by a counter pleading, constitute evidence and become a part of the record in the proceedings before the Commission. The facts stated in the petition filed by the Independent Directors have never been denied and are an adequate and sufficient ground for the Commission's action. No court has the power to substitute its judgment on this finding of fact for that of the Commission.

As the Court said in the **Utah Copper Case**, 129 F. 2d 358, 361 (10th Cir. 1942):

> "As to those matters entrusted to a board or commission, its determinations are final and conclusive if founded on substantial evidence, and if made free from arbitrary or capricious conduct."

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* *Baltimore & Ohio R. Co. v. United States*, 264 U. S. 258, 267 (1924).

** The General Rules of Practice of the Commission, insofar as relevant, are set forth in Appendix F. They are to be found in 49 U. S. C. A. 451 ff.

See also **Rochester Telephone Corp. v. United States**, 307 U. S. 125 (1939).

3. Parties to an administrative order are entitled to follow the order through the judicial proceedings which have been established for testing its validity.

The basic formulation of the general rule* which protects the rights of parties in interest to attack administrative orders pursuant to an orderly procedure was laid down by this Court in 1924 in **Baltimore & Ohio R. Co. v. United States**, 264 U. S. 258 (1924). The Court stated:

> "The plaintiffs may challenge the order because they are parties to it. . . . Moreover, the fact of intervention, allowed as it was, implies a finding by the Commission that the plaintiffs have an interest. In the proceedings before the Commission they opposed by evidence and argument the granting of the application. . . . No case has been found in which either this court, or any lower court, has denied to one who was a party to the proceedings before the Commission the right to challenge the order entered therein." (pp. 267-8)

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* It is true that

"Congress has not only devised different schemes of enforcement for different Acts. It has from time to time modified and restricted the scope of review under the same Act. . . . Moreover the same statute, as is true of the Interstate Commerce Act, may make some orders not judicially reviewable for any purpose . . . or reviewable by some who are adversely affected and not by others. . . . (There are) all sorts of permutations and combinations. . . ." Frankfurter, J., dissenting, *Stark v. Wickard*, 321 U. S. 308, 313 (1944).

While, however, each case is determined by the language of the applicable statute, it is important to note that interested parties, at the very minimum, have been permitted to follow through the established review procedures, even though the right to bring a separate and independent action has been restricted.

It may be that a party in interest before an administrative body does not ipso facto have the right to bring an independent court action to set aside the administrative order.* Prior to the decisions in these proceedings no court had held that a party before the Commission could have its rights to all judicial review of the administrative action denied. The error of such a denial is particularly manifest

> "(When the) . . . judicial process in bankruptcy proceedings under § 77 is, as it were, brigaded with the administrative process of the Commission . . . (and when) the authority of the Court is intertwined with that of the Commission."**

The unprecedented action by the lower courts is supported neither by statute nor case law. There is nothing in Section 77 (d) or (e) which gives any indication that Congress intended to establish a double standard or to impose one test for the interest needed to become a party before the Commission and another for the interest needed to follow the plan on its statutory course through the Courts.*** In **W. R. Grace & Co. v. Civil Aeronautics Board,** 154 F. 2d 271 (2nd Cir. 1946), the court, speaking through Judge Frank, stated (p. 280):

> "The Supreme Court, after what appear to be conflicting decisions as to whether a person with sufficient interest to become a party to a proceeding before an administrative agency has enough of an interest to maintain court review of that agency's order entered

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* *Boston Tow Boat Co. v. United States,* 321 U. S. 632 (1944). Cf. *Singer & Sons v. Union Pacific R. Co.,* 311 U. S. 305 (1940).

** *Palmer v. Massachusetts,* 308 U. S. 79, 87.

*** *Associated Industries v. Ickes,* 134 F. 2d 694 (2nd Cir. 1943).

> in that proceeding, recently stated that the question is now open and undecided."

Whether the question is "open and undecided," or already determined insofar as proceedings under Section 77 (e) are concerned, the present case requires that this Court review the decision of the lower courts.

B. None of the parties has the right to object to the participation by the Independent Directors in the Court proceedings.

The order of the Commission admitting the Independent Directors as parties in interest was entered in October, 1947. None of the present parties in interest in these proceedings have taken any steps to have this order, or the subsequent order of February, 1953,* revoked or modified, although such action might have been taken by them under Rule 101 of the Commission's General Rules of Practice.** By failing to take advantage of the administrative remedies provided by the rules of the Commission, the parties hereto have forfeited whatever rights they might otherwise have had to contest the standing of the Independent Directors before the court.

> "It hardly needs authorities to convince that an order made on notice to all parties in interest in the progress of an administrative proceeding is an adjudication and final, subject only to the right of review on appeal."
>
> **In re Fort Dodge D. N. & S. R. Co.**, 47 F. Supp. 95, 97 (D. D. C. 1953).

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* The order with reference to the substitution of Mr. Huston for a prior independent director.

** See Appendix F for Rule 101.

". . . (an appellant) cannot come to a court . . . until he has exhausted all available and sufficient administrative remedies . . . . Appellant claims he was denied his right of appeal . . . . There is no evidence to support that contention. He did not even try to appeal."

Johnson v. United States, 126 F. 2d 242, 247 (8th Cir. 1942).

C. The decision of the Court of Appeals in **Huston v. Thompson*** is not relevant here.

On November 5, 1954, the Bankruptcy Court entered an order authorizing and directing the Bankruptcy Trustee to pay certain interest coupons on the MOP First Mortgage Bonds. The Independent Directors appealed from this order and their appeal was dismissed by the Court of Appeals, which stated:

". . . (petitioners) have no authority to represent the debtor, its Board of Directors, or any defined or determinable group of creditors, stockholders, or others having a right to be heard in the reorganization proceedings in the District Court. That Court has denied the petitioners leave to intervene."**

This payment of interest was not a matter which was within the jurisdiction of the Commission but was rather within the "exclusive and non delegable control"*** of the Bankruptcy Court. As a result, no proceedings were ever held thereon before the Commission. The statutory

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* *Huston et al. v. Thompson, Trustee*, 217 F. 2d 308 (8th Cir. 1954).

** *Huston et al v. Thompson, Trustee*, 217 F. 2d 308, 309.

*** *Callaway v. Benton*, 336 U. S. 132, 142 (1949).

provisions with respect to hearings on the matters reserved to the Bankruptcy Court are, as already pointed out, different in purpose and language from those governing proceedings before the Commission. The Bankruptcy Court may have power to determine those persons who are to be permitted to intervene, or be heard, on administrative or other matters lying within its sole jurisdiction. It has no such power when it is acting upon matters which originate within the jurisdiction of the Commission.

D. The Independent Directors, as minority directors of MOP, are entitled to participate in the judicial proceedings dealing with the Plan.

The Missouri constitution provides that directors of Missouri corporations shall be elected by cumulative voting.* The Bankruptcy Court and the Court of Appeals have effectively nullified the intent of these provisions, which was to protect minority interests.

> "... the object of the section (providing for cumulative voting) is not to take away any rights of the majority of the company, but to protect the minority .... it will ... prevent the wrongs and abuses that are often secretly ... perpetrated upon unrepresented stockholders by selfish and unscrupulous boards of railroad directors. ..."**

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* This provision is set out in Appendix B.

** Taken from Illinois Constitutional Convention, Debates of Constitutional Convention, pp. 1666 ff. The Journal, Missouri Constitutional Convention (State Historical Society of Missouri) reveals that the almost identical provision in the Missouri Constitution was adopted without discussion in 1875, shortly after the Illinois Constitution was adopted. Vernon's Annotated Statutes of Missouri are cross-indexed to Illinois judicial decisions.

See also Fletcher, Cyclopedia of the Law of Private Corporations, Vol. 5, p. 197, 1952 ed.

Under more normal circumstances, minority protection would result from the presence of minority directors on a board of directors. With bankruptcy, however, even though the debtor railroad remains a "live and going concern,"* minority stockholders will obtain meaningful protection only if their representatives are permitted to appear and participate in the proceedings leading up to the development and implementation of the plan of reorganization of their company.

E. The hearings before the Bankruptcy Court on the approval of the Plan were improper.

The Bankruptcy Court stated at the outset of its opinion approving the Plan:**

> "Those objections (to participation of the Independent Directors in the proceedings) are now sustained . . . and the objections of the so-called Independent Directors will not be further considered."

The Court of Appeals dismissed the appeal of the Independent Directors with respect to the approval of the Plan.

As was stated by the District Court in **In re Denver & Rio Grande Western R. Co.**, 13 F. Supp. 821 (D. C. Colo. 1936):

> "A full hearing (on a plan of reorganization) with notice to all creditors and stockholders is required of that body (the Commission) and the jurisdiction of the District Court to which the plan is finally submitted for approval depends upon due notice to all parties in interest, a full hearing and consideration of the rights of all parties affected. . . ." (p. 824)

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* *St. Joe* case, p. 308.

** *In re Missouri Pacific Railroad Company*, 129 F. Supp. 392, 396.

Since the above standards were not complied with in the lower court proceedings in this case, the decisions and orders approving the Plan should not have been issued and are in error.

CONCLUSION.

As the facts set forth in the opinions of the Commission and the Bankruptcy Court demonstrate, the Plan was developed and worked out in its essential details long prior to the decision of this Court on April 5, 1954 in the **St. Joe** case. The Plan is based upon the proposition that Section 5 does not apply to Section 77 reorganizations. Rather than reconstructing the Plan after its legal foundations were destroyed by the **St. Joe** case, the events which led up to the development of the Plan were recast in an attempt to fit legal requirements which the Commission had never before considered applicable.*

The Plan is an old fashioned Section 77 plan of reorganization; it was not "voluntarily" "initiated" by the carriers it is proposed to merge; it has never been acted upon by "those who in the absence of bankruptcy would wield the corporate merger powers." The Commission and the lower courts have mistakenly treated the refusal of this Court in the **St. Joe** case to pass specifically upon mergers of the type here involved as a determination that the requirements of Section 5 do not apply to the present Plan.

The decisions approving the Plan are in direct conflict with the applicable law and this petition must be granted if the congenital defect in the Plan is to be remedied.

The decisions refusing to allow the Independent Directors to participate in the judicial proceedings are also in direct conflict with the applicable law, and the rights of

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* "But our beginnings never know our ends."

the petitioners Stewart Huston and Bolton Sullivan and the stockholders whose interests they serve require that this Court grant this petition so that the error of the Courts below may be corrected.

Respectfully submitted,

FREDERICK M. MYERS,
FREDERICK M. MYERS, JR.,
Attorneys for Stewart Huston and Bolton Sullivan, Independent Directors of Missouri Pacific Railroad Company.

The Petitioner Missouri Pacific Railroad Company 5¼% Secured Serial Bondholders Commiittee joins in the foregoing petition insofar as it relates to questions having to do with the legality of the Plan of Reorganization.

WILLIAM H. BIGGS,
BIGGS, CURTIS, BIGGS & CROSSEN,
Attorneys for Missouri Pacific Railroad Company 5¼% Secured Serial Bondholders Committee.

December 2, 1955.

APPENDIX AA.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

Before Sanborn, Woodrough and Van Oosterhout, Circuit Judges.

Woodrough, Circuit Judge.

On February 25, 1955, Judge Moore entered final orders in the proceedings under Section 77 of the Bankruptcy Act, 11 U. S. C. A. 205, entitled "In the Matter of Missouri Pacific Railroad, Debtor," approving the fourth Plan of Reorganization submitted to the Court by the Interstate Commerce Commission. The Orders were accompanied by the Court's Memorandum Opinion, 129 F. Supp. 392, and Findings of Fact and Conclusions of Law and all objections to the plan and all claims for equitable relief other than provided in it were overruled and denied. The details of the plan as approved appear in Volume LXIV of the Missouri Pacific Reorganization Proceedings. The distribution of cash and new securities under the plan is in accordance with the Commission's "Appendix J" which is published with Judge Moore's Memorandum Opinion. The opinion includes an account by statement and reference of the proceedings and adjudications that have been had in the Matter since its initiation in 1933.

The record in the appeals shows that on January 8, 1954, the court entered an order which authorized Guy A. Thompson, Trustee of the Debtor Companies, to cooperate with the parties in the proceedings to aid them to compose differences with respect to a plan of reorganization and on February 18, 1954, Commissioner Richard F. Mitchell expressed the hope in connection with a supplemental report in the proceedings that "settlement satisfactory to

the parties can be effected." Thereafter, following conferences and negotiations (fully reported), the Trustee, in a petition to the Commission, presented to it stipulations signed by nearly all of the major parties in interest to the reorganization proceedings approving and agreeing to support what was described and referred to therein as an "Agreed System Plan". This plan modified in certain respects the plan approved by the Examiners in their Proposed Report of February 17, 1954, which was a modification of the Commission's 1949 modified plan. The Trustee's petition and the stipulations were filed with the Commission on May 12, 1954, and the modified Plan of Reorganization contained therein was approved by the Commission and filed with the District Court on November 12, 1954. The court approved plan before us is the "Agreed System Plan," also referred to as the 1954 Plan.

The designation "Agreed Plan" is not a misnomer. No other plan of reorganization in this matter has received the support of such vast preponderance of affected interests as is shown by the stipulations that were signed and submitted and holders of securities amounting to many millions of dollars who opposed the earlier plans are now agreeing to and approving this one. The holdings of those who are still opposing the approved plan probably do not equal one third of one per cent of the market values involved in the case. If regard is had to the numbers of parties in interest, the contrast is much greater. Prior to the hearings in the District Court for approval of the plan, objections and claims for equitable treatment were filed by eight groups, but only three appeals, Nos. 15,335, 15,336, 15,337, have been taken to this court from the judgment approving the plan.

The appeal in Number 15,336 was taken by Bolton Sullivan and Stewart Huston, so-called "Independent Directors of Missouri Pacific Railroad Company." They filed objections and claims for equitable treatment in the District

Court and were permitted to participate in the hearing subject to the objection that they have no authority to represent the debtor, its Board of Directors, or any defined or determinable group of creditors, stockholders or others having a right to be heard. At the conclusion of the hearing, the District Court sustained the objection to the participation of these appellants in the proceedings and cited our decision in **Huston v. Thompson, Trustee,** 217 F. 2d 308. In that case we held that these appellants lacked power of representation exactly as stated in the objection. They have no authority to represent "any party in interest" within the intendment of Section 77 (e) or to represent "any * * * interested party" within Section 77 (c) (13). They are bound by the action of the Board of Directors of Missouri Pacific approving the plan. The court did not err in sustaining the objection against their participation and in refusing to consider their opposition to the plan. Although we heard oral argument for them and have studied their brief, we direct that their appeal be dismissed.

The appeal in Number 15,335 is taken in the name "Missouri Pacific Railroad Company 5¼% Secured Serial Bond Holders' Committee" which filed its objections to the Plan of Reorganization in the District Court on December 3, 1954. It alleged that it had been authorized to act in behalf of said bonds by Order of the Interstate Commerce Commission entered in the Matter of the Missouri Pacific Railroad Company on October 15, 1947, and it set forth forty-five grounds of objection. But on its present appeal, it has relied in its brief and oral argument upon the single point that "The present Agreed System Plan is illegal because there has been no compliance with the provisions of Section 5 of the Interstate Commerce Act" and it has cited only **St. Joe Paper Company v. Atlantic Coast Line Company,** 347 U. S. 298, and the statutes. The amount of the bonds represented by the appellant is not definitely shown but the 5¼% Secured Bond issue is recorded under in-

denture in the name of the Chemical Corn Exchange Bank and the bank approves the plan. Mr. DeLancey C. Smith, who is authorized to speak for about $5,000,000 of the $12,425,000 issue, does likewise.

The third appeal numbered 15,337 is prosecuted by Charles H. Albers and nine other individuals who are found by the District Court to be holders of capital stock of the New Orleans, Texas and Mexico Railway. It was shown that they hold about 6,140 shares or slightly in excess of four per cent of the outstanding shares of such stock which was acquired by them between 1945 and 1953 during which period the open market price averaged less than a hundred dollars a share according to Moody's Financial Service. The Chemical Corn Exchange Bank is the record owner of 121,460 shares or more than 81% and Guy A. Thompson as trustee of the Missouri Pacific, Debtor, holds 12% or 18,271 shares of the total share issue. The Bank and Thompson approve the plan.

The group as now constituted first appeared in the proceedings on September 28, 1954, petitioning for modification of the Commission's 7th Supplemental Report and Order and none of the group filed any exceptions to the Examiner's proposed report of February 17, 1954. They offered no material testimony at the hearing in District Court to show that the plan they oppose will damage their interests and left the finding of the court to the contrary to rest on uncontradicted testimony and they rely here, as they did in District Court, on legal argument to establish that they have been materially prejudiced by the Orders appealed from. That they have a technical right to prosecute an appeal is not disputed.[1]

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[1] The Commission has certified that in the vote taken for acceptance or rejection of the Plan by the Commission since the orders appealed from herein were entered, the Plan is approved by overwhelming majority by both the stock and creditor interests in the Debtor Companies.

All appellants contend in this court, as they did before the Commission and in the District Court, that the Commission lacked power to approve and certify to the court a plan providing, as does the presently approved plan, for the merger of the Debtor Companies. The 1949 Plan submitted to the District Court embodied the same merger of the debtors and the same objection was urged against it before the District Court and on appeal to this court. The District Court overruled the objection and this court on full consideration affirmed. Petitions for certiorari were duly presented to the Supreme Court to review the decision of this court in which our ruling on the objection was assigned as error. It was argued at length in support of a petition for certiorari that "The Commission had no power to impose the consolidation" and that "the requirements of Section 5 of the Transportation Act were consciously ignored by the Commission." The Supreme Court denied certiorari, 343 U. S. 918, and a memorandum in connection with the denial by Mr. Justice Frankfurter is reported at 343 U. S. 982. The memorandum makes direct reference to the fact that "The Commission's plan also eliminates existing corporations and directs financial power into new channels"

The main reliance of the appellants to support the contention that the merger embodied in the plan herein is illegal is upon expressions appearing in the opinion of the Supreme Court in **St. Joe Paper Co. v. Atlantic Coast Line R. Co.**, 347 U. S. 298. The opinion in that case was also written for the court by Mr. Justice Frankfurter and therefore may be read in the light of his acquaintance with what he referred to as the "long drawn out Missouri Pacific reorganization." When so read, the opinion in the **St. Joe** Case does not support the contentions of the opponents of this plan. On full consideration we conclude that Judge Moore has fairly set forth in his opinion the facts relative to the appellants' contentions concerning merger, the applicable law, the proper analysis and relevant import of the

St. Joe Case and has fully supported his conclusions that the report of the Commission should be approved as to the merger provisions embodied in it.

The other main contention that was urged in the District Court on behalf of the appellants in No. 15,337 and is repeated by it here is that the treatment accorded the common stock of the New Orleans, Texas and Mexico Railway is unfair and inequitable and that the Commission failed to apply applicable legal standards to it. The same contentions were urged by holders of the same stock against the 1949 plan. They were overruled by the District Court and the ruling was affirmed here. The contentions were presented to the Supreme Court in petitions for certiorari duly filed and the writ was denied. The present plan accords more favorable treatment to this stock than prior plans and the findings of the Commission in respect to it are amply supported. On full consideration of the record, briefs and argument, this court is in accord with the approval of the District Court of the findings and conclusions of the Commission in respect to the treatment accorded by the present plan to the NOT&M stock.

In view of the extended reasoned reports of the Commission fully covering the points of appellants here, and the carefully prepared opinion of the District Court which meets and disposes of the contentions of appellants, and of our own discussion of the same issues concerning NOT&M stock on the former appeal, 191 F. 2d 265, no good purpose could be served by further repetitious discussions of details. Our study of the record, briefs and arguments has not disclosed error on the part of the District Court. We adopt the Memorandum Opinion of the District Court as correctly disposing of the issues and fully supporting the Orders complained of.

Said Orders appealed from in Nos. 15,335 and 15,337 are in all respects affirmed.

(Judgment in Cause No. 15335.)

United States Court of Appeals
for the Eighth Circuit.

No. 15335.

September Term, 1955.

Wednesday, September 14, 1955.

Missouri Pacific Railroad Company 5¼% Secured Serial Bondholders' Committee, Appellant,

vs.

Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, et al.

Appeal from the United States District Court
for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Orders of the said District Court appealed from in this cause be, and they are in all respects hereby, affirmed.

September 14, 1955.

(Judgment in Cause No. 15336.)

United States Court of Appeals
for the Eighth Circuit.

No. 15336.

September Term, 1955.

Wednesday, September 14, 1955.

Bolton Sullivan and Stewart Huston, Independent Directors of Missouri Pacific Railroad Company, Appellants,

vs.

Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, et al.

Appeal from the United States District Court
for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the appeal from the Order of the said District Court complained of in this appeal be, and the same is hereby, dismissed.

September 14, 1955.

APPENDIX A.

Merger and Consolidation.

I. Louisiana Revised Statutes of 1950, Title 12, § 48.

§ 48—Merger or Consolidation; joint agreement for

The merger or consolidation of corporations and foreign corporations can be effected only as a result of a joint agreement entered into and filed as follows:

A. The board of directors of each of the corporations or foreign corporations as desire to merge or consolidate may, by majority vote, enter into a joint agreement signed by the directors and prescribing the terms and conditions of merger or consolidation, the mode of carrying the same into effect, with any other details and provisions as are deemed necessary.

B. The agreement shall be submitted to the shareholders of each of the merging or consolidating corporations and foreign corporations at meetings thereof duly called and specially and separately held, and unless otherwise provided in the articles of the corporations and foreign corporations, or either of them, if at the meetings the holders of two-thirds of each class of the voting power of all shareholders entitled to vote in each corporation or foreign corporation shall vote for the adoption of said agreement, then that fact shall be certified on the agreement, by the secretary of each meeting, and the agreement so adopted and certified shall be signed by the president or vice-president and secretary or assistant secretary of each of the corporations or foreign corporations, and acknowledged by the president or vice-president of each of the corporations or foreign corporations involved.

C. The shareholders of each corporation and foreign corporation shall have the right, unless otherwise provided in the articles of said corporations, or either of them, by the vote of the holders of two-thirds of the voting power, to

adopt any amendment to the agreement they may deem proper, and if such amendment be concurred in by the respective boards of directors of all the merging or consolidating corporations, and by two-thirds of the voting power of the other corporation or foreign corporation, the agreement so amended, when so certified, signed and acknowledged, shall be considered the merging or consolidating agreement.

II. Revised Statutes of the State of Missouri—1949.

Merger and Consolidation.

351.410 Merger procedure.—Any two or more domestic corporations formed for a purpose for which a corporation may be formed under this chapter and any domestic corporation or corporations and foreign corporation or corporations formed for a purpose for which a corporation might be formed under this chapter may merge into one of such corporations in the following manner; the board of directors of each corporation shall, by resolution adopted by a majority vote of the members of such board, approve a plan of merger setting forth:

(1) The names of the corporations proposing to merge, and the name of the corporation into which they propose to merge, which is herein designated as the surviving corporation;

(2) The terms and conditions of the proposed merger and the mode of carrying the same into effect;

(3) The manner and basis of converting the shares of each merging corporation into shares or other securities or obligations of the surviving corporation;

(4) A statement of any changes in the articles of incorporation of the surviving corporation to be effected by such merger;

(5) Such other provisions with respect to the proposed merger as are deemed necessary or desirable.

351.415 Consolidation procedure.—[Provisions for consolidation are substantially identical except that subparagraph (4) provides as follows]:

(4) With respect to the new corporation, all of the statements required to be set forth in articles of incorporation for corporations organized under this chapter.

351.420. Plan of merger or plan of consolidation shall be submitted to vote at meeting of stockholders.—The board of directors of each corporation, upon approving such plan of merger or plan of consolidation, shall, by resolution, direct that the plan be submitted to a vote at a meeting of shareholders, which may be either an annual or a special meeting.

351.425. Voting by shareholders on plan for merger or consolidation.—At each such meeting a vote of the shareholders entitled to vote thereat shall be taken on the proposed plan of merger or consolidation. The plan of merger or consolidation shall be approved upon receiving the affirmative vote of the holders of at least two-thirds of the outstanding shares entitled to vote at such meeting of each of such corporations.

351.450. New status after merger or consolidation has been effected.—When such merger or consolidation has been effected

(1) The several corporations parties to the plan of merger or consolidation shall be a single corporation, which, in the case of a merger, shall be that corporation designated in the plan of merger as the surviving corporation, and, in the case of a consolidation, shall be the new corporation provided for in the plan of consolidation;

(2) The separate existence of all corporations parties to the plan of merger or consolidation, except the surviving or new corporation shall cease.

APPENDIX B.

Cumulative Voting.

Constitution of State of Missouri (1945).

Article 11, § 6.

Cumulative Voting.

Section 6. In all elections for directors or managers of any corporation, each shareholder shall have the right to cast as many votes in the aggregate as shall equal the number of directors or managers to be elected, and may cast the whole number of votes, either in person or by proxy for one candidate, or distribute such votes among two or more candidates; and such directors or managers shall not be elected in any other manner.

Vernon's Annotated Missouri Statutes, Const., Art. 11, § 6.

APPENDIX C.

Chronology of Events.

November 25, 1952	1949 Plan or Reorganization remanded to Commission.
May, 1953.	Hearing before Bureau of Finance re plan of reorganization.
January 8, 1954.	Bankruptcy Court authorized MOP Trustee to take action with respect to plan of reorganization.
February 17, 1954.	Examiners' proposed report issued by Commission Bureau of Finance.
April 5, 1954.	**St. Joe** case decided by United States Supreme Court.
May 12, 1954.	Agreed System Plan filed with Commission by MOP Trustee.
July 29, 1954, and November 9, 1954.	Seventh and Eighth Supplemental Reports and Orders of Commission approving Agreed System Plan issued.
February 25, 1955.	Bankruptcy Court Order approving Plan issued.
July 5, 19, 1955	Commission certified vote of security holders on Plan to Bankruptcy Court.
September 14, 1955.	Court of Appeals affirmed approval of Plan by Bankruptcy Court.
September 19, 1955.	Bankruptcy Court Order confirming Plan issued.

APPENDIX D.

Stipulation on Confirmation.

In the
UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

Missouri Pacific Railroad Company 5¼% Secured Serial Bondholders' Committee, Appellant, v. Guy A. Thompson, Trustee, Missouri Pacific Railroad Company et al., Debtors, Appellees.	No. 15,471.
Bolton Sullivan et al., Independent Directors of Missouri Pacific Railroad Company, Appellants, v. Guy A. Thompson, Trustee, Missouri Pacific Railroad Company et al., Debtors, Appellees.	No. 15,472.

Stipulation of Attorneys for Appellants and Appellees Re: Record on Appeals and Their Submission Without Argument.

This Stipulation and Agreement, made and entered into this 18th day of November, 1955, by and between Attorneys for Missouri Pacific Railroad Company 5¼% Secured Serial Bondholders' Committee and Bolton Sullivan

and Stewart Huston, Independent Directors of Missouri Pacific Railroad Company, as Parties of the First Part (hereinafter called "Appellants"), and Attorneys for Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, and other Debtor Railroads in Proceedings for the Reorganization of a Railroad No. 6935, In the Matter of Missouri Pacific Railroad Company, Debtor, pending in the District Court of the United States, Eastern Division, Eastern Judicial District of Missouri (hereinafter called the "District Court"), in behalf of said Trustee and all other parties in interest to said proceedings who may desire to avail themselves of the understandings and agreements herein contained, Parties of the Second Part (hereinafter called "Appellees"):

Whereas, a modified plan of reorganization for Debtor Companies (hereinafter called the "Plan") was approved by an Opinion of the Hon. Geo. H. Moore, Judge of the District Court, duly filed in the reorganization proceedings on February 25, 1955, and by an Order of approval duly entered and filed in said proceedings on the same date; and

Whereas, Appellants prosecuted appeals from the aforesaid Order which was duly affirmed by the United States Court of Appeals for the Eighth Circuit (hereinafter called the "Court of Appeals") on September 14, 1955; and

Whereas, the Interstate Commerce Commission (hereinafter called the "Commission") duly submitted the Plan to creditors and stockholders of Debtor Companies entitled to vote thereon for acceptance or rejection; and

Whereas, the Commission by its Certificate dated July 5, 1955, and its Supplemental Certificate dated July 19, 1955, certified the results of the submission of the Plan to the District Court, said Certificates being filed in the

Office of the Clerk of said Court on July 6 and July 20, 1955, respectively; and

Whereas, pursuant to Order No. 4590 of the District Court, duly entered on July 5, 1955, the matter of confirmation of the Plan was duly set for hearing on July 21, 1955; and

Whereas, said hearing was held and concluded on said date; and

Whereas, the Hon. Geo. H. Moore, Judge of the District Court, duly filed an Opinion confirming said Plan on September 19, 1955, and on the same day an Order was duly entered and filed confirming the Plan; and

Whereas, on October 14, 1955, Parties of the First Part duly filed their notices of appeal in the Offices of the Clerk of the District Court; and

Whereas, Appellants have caused said appeals to be duly docketed in the Court of Appeals where they have been respectively assigned the following numbers: 15,471 and 15,472; and

Whereas, the evidence offered at the confirmation hearing in the District Court included all testimony and exhibits accepted in evidence at the prior approval hearing in said Court; and

Whereas, among other things, there was also offered and accepted in evidence at said confirmation hearing, the Certificates of the Commission setting forth the results of the submission of the Plan to creditors and stockholders and a copy of all ballots cast in said submission; and

Whereas, the issues raised by Appellants on the prior appeals from the District Court's approval Opinion No.

4418 and Order No. 4418-A are the same as those urged by the present appeals from the District Court's confirmation Opinion No. 4590 and Order No. 4590-A:

Now, Therefore, for the purpose of expediting the aforesaid appeals and the ultimate decision thereof by the Court of Appeals, the parties hereto stipulate and agree as follows:

1. The basic Record on these appeals shall be the six volume Record on appeal from the District Court's Order approving the Plan, said appeals being numbered 15,335-6-7.

2. Said Record shall also include:

(a) Order No. 4590 setting the matter of confirmation for hearing in the District Court on July 21, 1955, Opinion No. 4590 and Order No. 4590-A, entered and filed in the District Court on September 19, 1955, confirming said Plan;

(b) The Certificate and Supplemental Certificate of the Commission dated July 5 and July 19, 1955, respectively, setting forth the results of the submission of the Plan to creditors and stockholders entitled to vote thereon, duly filed in the Office of the Clerk of the District Court on July 6 and July 20, 1955, respectively;

(c) Objections to confirmation of the Plan filed in the Office of the Clerk of the District Court on July 18, 1955, by Parties of the First Part, the same being numbered respectively as Objections No. 4590-B and No. 4590-C;

(d) Docket entries of the Clerk of the District Court relating to the confirmation hearing, the Opinion and Order of the Court confirming the Plan, and the appeals therefrom;

(e) Notices of appeal from the District Court Opinion No. 4590 and its Order confirming the Plan, No. 4590-A, filed by Appellants;

(f) Transcript of the proceedings at the hearing on confirmation of the Plan, held in the District Court on July 21, 1955, including the exhibits numbered "Trustee's Nos. 1 to 12, inclusive."

3. The Statements of Points to Be Relied Upon shall be the same as those filed by Appellants on the appeals from the Order of the District Court approving the Plan which are set forth in Volume I of the Record in Appeals Nos. 15,335-6, at pages 1, 2, 4 and 5 thereof.

4. The briefs, answering briefs and reply briefs filed by parties appellant and appellee on the prior appeals from the Order approving the Plan shall be offered on the appeals from confirmation of the Plan, and together with the oral argument of the prior appeals may be duly considered by the Court of Appeals as if filed or made, as the case may be, on said appeals from confirmation of the Plan.

5. Subject to the approval of the Court of Appeals, the parties hereto waive all rights which they may have to file any further briefs, answering briefs and reply briefs and all rights to oral argument of these appeals before the Court of Appeals. Said parties further agree that these appeals from the District Court's Opinion and Order confirming the Plan may be decided forthwith by the Court of Appeals without further notice with respect to said appeals and without any hearing thereof.

The parties further stipulate and agree that copies of this stipulation may be duly filed in the Office of the Clerk of the Court of Appeals and that any printed Record that

may be necessary to meet the requirements of the Rules of the Court will be promptly prepared and filed therein.

Dated November 18, 1955.

William H. Biggs,
Attorney for Missouri Pacific Railroad Company 5¼% Secured Serial Bondholders' Committee.

Frederick M. Myers,
Attorney for Bolton Sullivan et al.,
Parties of the First Part.

Russell L. Dearmont,
Attorney for Guy A. Thompson,
Trustee, etc., et al.,
Parties of the Second Part.

APPENDIX E.

Certificate of Vote of Commission.

APPENDIX A.

CERTIFICATE.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D. C., on the 5th day of July, A. D. 1955.

Finance Docket No. 9918.

Missouri Pacific Railroad Company Reorganization.

The Commission, Division 4, having on May 10, 1955, pursuant to its order of May 2, 1955, in this proceeding, submitted for acceptance or rejection by creditors and stockholders of classes shown below, the plan of reorganization of the Missouri Pacific Railroad Company et al., debtors, approved by the Commission by its seventh and eighth supplemental reports and orders of July 29 and November 9, 1954, and approved by the United States District Court for the Eastern Judicial District of Missouri, Eastern Division, by order filed February 25, 1955:

Class 1	Common stock of Missouri Pacific Railroad Company.
Class 2 (a)	Preferred stock of Missouri Pacific Railroad Company.
Class 2 (b)	Missouri overcharge claims which the court has found are entitled to be paid in preferred stock of Missouri Pacific Railroad Company.

Class 3	New Orleans, Texas & Mexico Railway Company capital stock, including that outstanding in the hands of the public and that pledged under Missouri Pacific Railroad Company 5¼-percent secured serial bonds.
Class 4 (a) (1)	General unsecured claims against New Orleans, Texas & Mexico Railway Company and the subsidiary debtors other than International-Great Northern Railroad Company.
Class 4 (a) (2)	General unsecured claims against the Missouri Pacific Railroad Company and other debtors except the New Orleans, Texas & Mexico Railway Company and its subsidiary debtors.
Class 4 (b)	Missouri Pacific Railroad Company 5½-percent twenty-year convertible bonds.
Class 13	Little Rock & Hot Springs Western Railroad Company bonds.
Class 14	Central Branch Union Pacific Railway Company bonds.
Class 15	Boonville, St. Louis & Southern Railway Company bonds.
Class 17	Missouri Pacific Railroad Company first and refunding mortgage bonds.
Class 18	Missouri Pacific Railroad Company general mortgage bonds.
Class 19	Missouri Pacific Railroad Company 5¼-percent secured serial bonds.
Class 21 (a)	New Orleans, Texas & Mexico Railway Company first mortgage bonds.

Class 22 International-Great Northern Railroad Company first mortgage bonds.

Class 23 International-Great Northern Railroad Company adjustment mortgage bonds.

It is hereby certified, That proper ballots as shown in table No. 2 hereof were received from creditors and stockholders voting bonds, unsecured claims, and preferred and common stock in each of the classes, and constituting the percentages of the total principal amount or number of shares outstanding in each class as shown in the following table No. 1:

TABLE NO. 1.

Class	Amount Outstanding in Hands of Public at May 10, 1955	Total Amount Voted	Percentage
1	813,143 (shares)	560,916 (shares)	68.98
2 (a)	701,901 (shares)	382,355 (shares)	54.47
2 (b)	$ 303,500.00	$ 7,318.79	2.41
3	130,058 (shares) [1]	78,743 (shares)	60.54
4 (a) (1)	$ 13,884.83	0	0
4 (a) (2)	323,350.00	$ 26,239.02	8.11
4 (b)	45,493,000.00	21,379,000.00	46.99
13	1,140,000.00	271,000.00	23.77
14	523,000.00	298,000.00	56.98
15	5,500.00	0	0
17	223,190,500.00	97,157,500.00	43.53
18	49,308,500.00	22,318,500.00	45.26
19	10,425,000.00	7,236,000.00	69.41
21 (a)	40,615,900.00	17,231,500.00	42.42
22	28,750,000.00	10,971,700.00	38.16
23	13,807,700.00	4,963,100.00	35.94

[1] Includes 121,460 shares of New Orleans, Texas & Mexico Railway Company stock pledged under Missouri Pacific Railroad Company secured serial 5¼-percent bonds. Each $1,000 bond voted in class 19 has been counted as a vote in class 3 for 10 shares of stock.

It is further certified, That proper ballots for acceptance or rejection of the plan were transmitted within the time specified in the order of May 2, 1955, by creditors and stockholders as shown in the following table No. 2:

TABLE NO. 2.

Class	Amount Outstanding in Hands of Public at May 10, 1955	Proper Ballots Voted Shares or Principal Amount Voted Accept	Percent	Reject	Percent
1	813,143 (shares)	558,661	99.60	2,255	.40
2 (a)	701,901 (shares)	363,280	95.01	19,075	4.99
2 (b)	$ 303,500.00	$ 7,318.79	100.00	0	0
3[1]	130,058 (shares)	46,636	59.23	32,107	40.77
4 (a) (1)	$ 13,884.83	0	0	0	0
4 (a) (2)	323,350.00	$ 26,239.02	100.00	0	0
4 (b)	45,493,000.00	21,361,000.00	99.92	18,000.00	.08
13	1,140,000.00	271,000.00	100.00	0	0
14	523,000.00	298,000.00	100.00	0	0
15	5,500.00	0	0	0	0
17	223,190,500.00	89,655,500.00	92.28	7,502,000.00	7.72
18	49,308,500.00	22,264,000.00	99.76	54,500.00	.24
19	10,425,000.00	4,632,000.00	64.01	2,604,000.00	35.99
21 (a)	40,615,900.00	16,264,500.00	94.39	967,000.00	5.61
22	28,750,000.00	10,756,700.00	98.04	215,000.00	1.96
23	13,807,700.00	4,953,100.00	99.80	10,000.00	.20

[1] See Note 1, Table No. 1.

It is further certified, That the amounts shown above as voted on proper ballots are after giving effect to reductions in the principal amount or numbers of shares stated on said ballots because, (1) with respect to bonds, the principal amount stated was not fully supported by record holdings of registered bonds or listed outstanding serial numbers of bearer bonds, or ownership was not satisfactorily established of securities voted on more than one ballot, and (2) with respect to stock, the number of shares stated was in excess of the amount of which the voter or his principal was the record holder; and that the amounts eliminated for said reasons from ballots voting to accept and reject, respectively, are set forth below in table No. 3.

TABLE NO. 3.

Class	Accept	Reject
1	2,655 shares	195 shares
2 (a)	1,625 shares	300 shares
4 (b)	$ 80,000	0
17	597,000	$47,000
18	204,000	1,000
19	98,000	30,000
21 (a)	55,000	4,000
22	151,000	10,600
23	61,500	0

It is further certified, That ballots deemed defective, for the reason they failed to show whether the ballots were intended for acceptance or rejection of the plan, were transmitted within the time specified in the order of May 2, 1955, by creditors and stockholders in aggregate principal amount or number of shares as follows, viz.: Class 1, 840 shares; Class 2 (a), 827 shares; Class 4 (a) (2), $2,472; Class 4 (b), $430,000; Class 17, $2,743,500; Class 18, $185,000; Class 19, $3,000; Class 21 (a), $927,000; Class 22, $190,000; and Class 23, $140,000.

It is further certified, That ballots deemed defective, for the reason they failed to state the number of shares of stock or principal amount of bonds voted, were transmitted within the time specified in the order of May 2, 1955, by creditors and stockholders, in numbers and classes as follows:

TABLE NO. 4.

	Number of Ballots		
Class	Accept	Reject	Other [1]
1	26	1	7
2 (a)	28	1	8
3	1	0	0
4 (b)	16	0	6
17	139	5	28
18	20	0	3
19	3	3	0
21 (a)	23	1	5
22	21	1	1
23	1	0	1

[1] Did not designate whether for acceptance or rejection.

It is further certified, That other ballots were transmitted by creditors and stockholders within the time specified in the order of May 2, 1955, which purported to vote shares of stock or bonds or claims in the amounts and in the manner stated in table No. 5 below, but which, in accordance with the "Rules for Handling and Counting Ballots of Creditors and Stockholders" set forth in the Appendix to the said order of May 2, 1955, are deemed defective for one or more of the following stated reasons: (1) the ballots were not properly signed, (2) the voter attempted to vote stock or registered bonds of which he or his principal was not the record holder at the close of business on May 10, 1955, (3) the voter, not being a record holder of registered bonds, failed to list serial numbers of unregistered bonds in support of the amount voted, or the numbers listed were not outstanding, (4) the signature of the voter was not witnessed or (in the case of a corporation) not attested, (5) the ballot or attachments failed to indicate whether the voter was executing the ballot as principal or in a representative capacity, (6) no satisfactory evidence was submitted of the authority of an agent or fiduciary to execute the ballot, or (7) the address of the voter or witness was omitted from the ballot or was incomplete; and that amounts attempted to be voted on a ballot deemed defective for more than one of the foregoing reasons has not been duplicated but is included in only one of the aforementioned categories.

TABLE NO. 5.

Class	Ballots Not —Properly Signed— Accept	Reject	Stock and Registered Bonds Not Voted by —Record Holder— Accept	Reject	Serial Numbers of —Bonds Not Listed— Accept	Reject
1	10,928 sh.	3 sh.	10,265 sh.	35 sh.	0	0
2 (a)	43,230 sh.	0	19,977 sh.	200 sh.	0	0
3	11 sh.	0	0	41 sh.	0	0
4 (a) (2)	$ 2,190	0	0	0	0	0
4 (b)	2,127,000	$ 3,000	0	0	$ 524,000	0
13	0	0	0	0	11,000	0
17	2,874,800	10,000	$22,000	0	2,443,500	$36,000
18	1,722,000	0	0	0	952,000	10,000
19	22,000	0	0	0	40,000	51,000
21 (a)	135,600	0	0	0	323,000	0
22	935,500	2,000	0	0	381,200	0
23	2,467,500	0	0	0	133,000	0

TABLE NO. 5—Continued.

Class	Signature Not Witnessed or ——Attested—— Accept	Reject	Failure to Indicate Whether Principal or Representative Accept	Reject	No Satisfactory Evidence of Authority to Execute Ballots Accept	Reject
1	13,794 sh.	100 sh.	5,233 sh.	400 sh.	350 sh.	0
2 (a)	21,469 sh.	859 sh.	11,106 sh.	6,000 sh.	25 sh.	1,311
3	600 sh.	92 sh.	158 sh.	399 sh.	0	0
4 (a) (1)	$ 79.30	0	0	0	$ 3,500	0
4 (a) (2)	7,500	0	$ 9,370	0	69,221.53	0
4 (b)	1,892,000	$ 12,000	875,000	0	2,325,000	$ 6,000
13	631,000	0	1,000	0	5,000	0
14	26,000	0	0	0	14,000	0
17	9,294,500	5,859,000	3,605,000	$132,000	15,328,500	170,000
18	2,700,000	5,000	1,944,500	0	2,996,000	0
19	114,000	114,000	92,000	20,000	120,000	84,000
21 (a)	4,081,500	0	704,000	11,000	1,447,500	7,000
22	2,228,000	50,000	452,000	1,000	3,409,000	2,000
23	626,000	0	202,000	0	518,400	0

TABLE NO. 5—Continued.

Class	Addresses Omitted —or Incomplete— Accept	Reject	Totals Accept	Reject
1	902 sh.	0	40,842 sh.	538 sh.
2 (a)	2,035 sh.	0	97,842 sh.	8,370 sh.
3	82 sh.	0	851 sh.	532 sh.
4 (a) (1)	0	0	$ 3,579.30	0
4 (a) (2)	$ 1,560	0	89,841.53	0
4 (b)	169,000	$ 1,000	7,912,000	$ 22,000
13	0	0	648,000	0
14	0	0	40,000	0
17	485,500	5,000	34,053,800	6,212,000
18	165,000	0	10,479,500	15,000
19	223,000	20,000	611,000	289,000
21 (a)	137,000	0	6,828,600	18,000
22	35,000	0	7,440,700	55,000
23	0	0	3,946,900	0

By the Commission, division 4.

HAROLD D. McCOY,
Secretary.

(Seal)

Filed Jul. 6, 1955. James J. O'Connor, Clerk.

APPENDIX F.

Excerpts From General Rules of Practice of the Interstate Commerce Commission.

Rule 19. **Pleadings part of record.** Recitals of material and relevant facts in a pleading filed prior to oral hearing in any proceeding, unless specifically denied in a counterpleading filed under these rules, shall constitute evidence and be a part of the record without special admission or incorporation therein, but if request is seasonably made, a competent witness must be made available for cross-examination on the evidence so included in the record.

Rule 72. **Intervention: Petitions.**—(a) **Content generally.** A petition for leave to intervene must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, and whether petitioner's position is in support of or opposition to the relief sought. If the proceeding be by formal complaint and affirmative relief be sought by petitioner, the petition should conform to the requirements for a formal complaint.

(b) **When filed.** A petition for leave to intervene in any proceeding should be filed prior to or at the time the proceeding is called for hearing, but not after, except for good cause shown.

(c) **Broadening issues; filing.** If the petitioner seeks a broadening of the issues and shows that they would not thereby be unduly broadened, and in respect thereof seeks affirmative relief, the petition should be filed in season to permit service upon and answer by the parties in advance of the hearing.

(d) **Copies; service.** When tendered at the hearing, sufficient copies of a petition for leave to intervene must be provided for distribution as motion papers to the parties represented at the hearing. If leave be granted at the hearing, one additional copy must be furnished for the use of the Commission. When not tendered at the hearing, the original of the petition shall be accompanied by copies in sufficient number to enable the Commission to retain one for its own use after it has made such service, if any, as next mentioned. All petitions for leave to intervene not tendered at the hearing will be served by the Commission, and copies shall be furnished accordingly, except petitions for leave to intervene in application proceedings under part II, which shall be served by the petitioners.

(e) **Disposition.** Leave will not be granted except on averments reasonably pertinent to the issues already presented and which do not unduly broaden them. If leave is granted, the petitioner thereby becomes an intervener and a party to the proceeding.

Rule 101. **Petitions for rehearing, reargument, or reconsideration.**—(a) **In general.** A petition seeking any change in a decision, order, or requirement of the Commission should specify whether the prayer is for reconsideration, reargument, rehearing, further hearing, modification of effective date, vacation, suspension, or otherwise.

(b) **Rehearing or further hearing.** When in a petition filed under this rule opportunity is sought to introduce evidence, the evidence to be adduced must be stated briefly, such evidence must not appear to be cumulative, and explanation must be given why such evidence was not previously adduced.

(c) **Modification of effective date.** A petition under this rule seeking only modification of the effective date

of a decision, order, or requirement, or in the period of notice, or other period or date prescribed therein, must be filed seasonably, except that, in case of unforeseen emergency satisfactorily shown by petitioner, such relief may be sought informally, by telegram or otherwise provided like notice is simultaneously communicated to all parties of record.

(d) **Reconsideration.** If relief under this rule other than under subdivisions (b) and (c) is sought, the matters claimed to have been erroneously decided and the alleged errors or relief sought must be specified with the particularity respecting exceptions as outlined in rule 96 (a), as should also any substitute finding or other substitute requirement desired by petitioner.

(e) **Time for filing.** Except for good cause shown, and upon leave granted, petitions under this rule must be filed within 30 days after the date of service of a decision or order granting an application in whole or in part, and within 60 days after the date of service of any other character of decision or order.

(f) **Successive petitions on same grounds, not entertained.** A successive petition under paragraph (d) of this section submitted by the same party or parties, and upon substantially the same grounds as a former petition, which has been considered and denied by the entire Commission will not be entertained.

[illegible]

IN THE

SUPREME COURT OF THE [illegible]

OCTOBER TERM, 1956.

No. 566.

MISSOURI PACIFIC RAILROAD COMPANY [illegible] SERIAL BONDHOLDERS COMMITTEE, Petitioners,

v.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor, et al., Respondents.

BOLTON SULLIVAN and STEWART HUSTON, Directors of Missouri Pacific Railroad Company, Petitioners,

v.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor, et al., Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. 568.

MISSOURI PACIFIC RAILROAD COMPANY 5¼% SECURED SERIAL BONDHOLDERS COMMITTEE, Petitioner,

v.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor, et al., Respondents.

BOLTON SULLIVAN and STEWART HUSTON, Independent Directors of Missouri Pacific Railroad Company, Petitioners,

v.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor, et al., Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

STATEMENT OF CASE AND DESCRIPTION OF PARTIES.

Petition for writ of certiorari to the Court of Appeals for the Eighth Circuit to review the validity of that Court's decision approving the Plan of Reorganization for Missouri Pacific Railroad Company and subsidiary Debtor

Companies has been filed by Bolton Sullivan and Stewart Huston in their capacity as minority directors of Missouri Pacific Railroad Company. They designate themselves as "Independent Directors," and we will refer to them accordingly. The Missouri Pacific Railroad Company 5¼ percent Secured Serial Bondholders' Committee (herein referred to as "Secured Serial Committee") joins in the aforesaid petition "in so far as it relates to questions having to do with the legality of the Plan of Reorganization." A companion petition for certiorari has been filed under this Court's **Docket No. 567** by Charles Albers and associates.

The contentions of these petitioners, in so far as the merits of the controversy are concerned, rest upon their interpretation of this Court's decision in **St. Joe Paper Co. v. Atlantic Coast Line R. Co.**, 347 U. S. 298, referred to as the **St. Joe case**, and the application of that decision to the facts in the Missouri Pacific System Reorganization. The arguments of petitioners in the case at bar are substantially the same as the arguments of the Albers Group in Docket No. 567. Respondents have filed brief in Docket No. 567 in opposition to the granting of the Albers' petition, and said brief is now referred to and adopted as Respondents' answer to the contentions appearing in the first 35 pages of the petition and argument of the Independent Directors and the Secured Serial Bondholders Committee in the case at bar.

The **Secured Serial Committee** claims authority to represent holders of Missouri Pacific Secured Serial Bonds back of which is pledged a substantial portion of Missouri Pacific's stock of the New Orleans, Texas & Mexico Railway Company. If the petition for writ of certiorari filed by the Albers Group (Docket No. 567) is denied, surely the petition of the Secured Serial Bondholders should also be denied, for both groups rely solely upon the same inter-

pretation and alleged application of the St. Joe opinion to the facts involved in the Missouri Pacific System Reorganization. There is nothing in the petition or supporting brief in the case at bar indicating that the Secured Serial Committee actually represents any securities, and no reference is made to any portion of the voluminious record in this case disclosing that this Committee has an appealable interest. True, it is a Committee, but a Committee which represents no one can exist without being a party in interest.

Certainly before the **Independent Directors** have any right or standing to be heard respecting the merits of this controversy, they must establish their status as "parties in interest," for the Court below has specifically adjudicated that they are not parties in interest. The remainder of this brief will be devoted to a consideration of the status of the Independent Directors.

Ruling of the Court Below.

The Court of Appeals has twice found that these so-called Independent Directors have no authority as such to speak for any parties in interest. No appeal was taken from the earlier finding in **Huston v. Thompson, Trustee,** 217 Fed. 2d 308. We think that decision is *res judicata.* The appearance of these Independent Directors in the same capacity as objectors to the Agreed System Plan was disposed of by the Court of Appeals in the following language (**Missouri Pacific R. Co. 5¼% S. S. B. C. et al. v. Thompson et al.,** 225 F. 2d 761, also Appendix AA of Petitioners' Brief, pp. 50-51):

> "They filed objections and claims for equitable treatment in the District Court and were permitted to participate in the hearing subject to the objection that they have no authority to represent the debtor, its Board of Directors, or any defined or de-

terminable group of creditors, stockholders, or others having a right to be heard. At the conclusion of the hearing, the District Court sustained the objection to the participation of these appellants in the proceedings and cited our decision in **Huston v. Thompson, Trustee**, 217 F. 2d 308. In that case we held that these appellants lacked power of representation exactly as stated in the objection. They have no authority to represent 'any party in interest' within the intendment of Section 77 (e) or to represent 'any * * * interested party' within Section 77 (c) (13). They are bound by the action of the Board of Directors of Missouri Pacific approving the plan. The court did not err in sustaining the objection against their participation and in refusing to consider their opposition to the plan. Although we heard oral argument for them and have studied their brief, we direct that their appeal be dismissed."

ARGUMENT.

It is the contention of Respondents that before the Independent Directors can presume to be heard in opposition to the approval of the Missouri Pacific System Plan, they must first convince this Court that the Court of Appeals below was in error in adjudicating that, solely as minority directors and without representing any determinable securities or security holders they are not parties in interest entitled to be heard in opposition to the Plan. Such a finding does no violence to the requirement that parties in interest must be given an opportunity to be heard. It is merely a finding of fact, entirely aside from any requirement in Section 77, to the effect that the minority directors in the capacity in which they allegedly appeared represented no securities or security holders in the proceedings, and were therefore not parties in interest. This factual determination by the lower court is not such a matter of public concern and importance as of itself to warrant the granting of certiorari; and if certiorari is not to be granted on this ground, then these Independent Directors are not properly before this Court for the purpose of arguing on the merits their objections to the Agreed System Plan. As to them we think the writ should be summarily denied. If the questions affecting consolidations in reorganization proceedings here presented are of a nature which should be considered by this Court, these questions can be fully decided on the Albers et al. petition in Docket No. 567, without the necessity of briefing and disposing of the same issues attempted to be raised by these Independent Directors in a separate appeal.

The so-called Independent Directors have not elected to appear in these proceedings in their individual capacities either as stockholders or creditors. They appear solely as two minority directors of the Debtor Missouri Pacific Rail-

road Company, and as such minority directors, and solely by virtue of that relationship, assert the right to prosecute this appeal in behalf of certain stockholders who several years previously owned Missouri Pacific stock and permitted that stock to be voted for Huston and Sullivan as directors.

To quote from their brief filed in the Court of Appeals (pp. 17-18):

> "The Independent Directors do not represent and do not claim to represent the Debtor, MOP, nor the Board of Directors of the Debtor; nor do they function as a stockholders' committee. The Independent Directors are two of the members of the MOP Board, elected originally as a result of independent proxy solicitation. They speak as two directors, and they speak in that capacity for the stockholders who have given them their support in the various elections since 1944."

Disposing of this same contention of these same two minority directors, the Court of Appeals, in **Huston et al. v. Thompson, Trustee**, 217 F. 2d 308, said:

> "The petitioners are two of the fifteen members of the Board of Directors of the debtor railroad company. They have no authority to represent the debtor, its Board of Directors, or any defined or determinable group of creditors, stockholders, or others having a right to be heard in the reorganization proceedings in the District Court."

The same considerations which prompted that Court's denial of the Independent Directors' right of appeal from an interest payment order in the reorganization proceedings apply with equal force to their presently contended right of appeal from the order approving the Plan.

The act makes ample provision for the protection of minorities.

Section 77 (b) provides:

> "For all purposes of this section, any creditor or stockholder may act in person or by an attorney at law or **by a duly authorized agent or committee** subject to the provisions of subsection (p) hereof." (Emphasis supplied.)

Section 77 (c) (13) provides:

> "The debtor, any creditor, or stockholders, or the **duly authorized committee, attorney or agent** of either or the trustee or trustees of any mortgage, deed of trust or indenture pursuant to which securities of the debtors are outstanding, shall have the right to be heard on all questions arising in the proceedings, and, upon petition therefor and cause shown, any such person or any other interested party may be permitted to intervene." (Emphasis supplied.)

The election of the minority directors by minority stockholders does not of itself "duly authorize" representation of the minority stockholders beyond the Board room. If the minority stockholders need such representation and the minority directors wish to extend their representation to the plan and the proceedings, the limitations and requirements with which they must conform are set forth in subdivision (p) of Section 77.

For several years these minority directors, flaunting the requirements of Section 77 (p), have usurped the functions of a committee in their purported representation of an undetermined group of minority stockholders. They now argue that the Commission's order admitting the Independent Directors as parties before the Commission cannot

be ignored by the Court. They argue that their admission as parties in the proceedings before the Commission involve a finding of facts as to the sufficiency of the capacity in which they appeared, which finding cannot be set aside by the Court. They further argue that Section 77 proceedings before the Commission and the Court are a continuous proceeding, and that a party in interest before the Commission in the reorganization proceedings with respect to the development of a plan and its final approval or disapproval must be a party for the entire proceedings.

The fallacy of this argument is that their participation in the proceedings before the Commission was not pursuant to any finding of facts by the Commission, but rather upon an erroneous interpretation of law to the effect that as minority directors their authority to speak for minority stockholders extended to the formulation of a plan and participation in the reorganization proceedings. Their brief refers to no place in the record where such factual finding by the Commission can be found. Their claim is not that they were specifically authorized to represent any particular stockholder, but that their election as minority directors carried with it this authority as an implication of law. In determining such legal questions the Court, rather than the Commission, has paramount authority.

The Independent Directors are two of the members of the Missouri Pacific Board, elected originally as a result of an independent proxy solicitation. These proxies are not in evidence. If the wording of the proxies was sufficient to authorize these so-called Independent Directors to represent the minority stockholders in the Reorganization Proceedings and in the formulation of a Plan, then they appear to be acting in direct violation of Section 77 (p), which in part provides:

> "It shall be unlawful for any person * * * to solicit or permit the use of his name to solicit, from any

> creditor or shareholders * * * any proxy or authorization to represent any such creditor or shareholder in such proceedings or in any matter relating to such proceedings * * * unless and until * * * the Commission after hearing by order authorizes such solicitation, use, employment or action * * *."

They have not attempted to qualify as a committee under subdivision (p) of Section 77.

The Board of Directors of a debtor company as a body may act for the debtor and may be represented in the proceedings, but neither the Board nor any member thereof can commit any individual stockholder. These individual stockholders have the right to appear in person or through committees, and in their discretion may assert contentions at variance with the position taken by the debtor acting through its Board of Directors. In short, these two minority directors have assumed authority far beyond the scope of their employment.

It may indeed seem strange to this Court, as it does to parties in interest, why these Independent Directors, who ostensibly champion the rights of Missouri Pacific stockholders, have associated themselves in the same brief with the Secured Serial Committee whose claim to more equitable treatment rests upon the comparative equity of the New Orleans, Texas & Mexico Railway Company stock. The only possible interest that these two groups could have in common is a joint desire to scrap the Agreed System Plan. Just why these minority Directors desire that the Plan be scrapped is not apparent in the face of the fact that 99.60 percent of the Missouri Pacific common stock and 95.01 percent of the Missouri Pacific preferred stock which was voted on the Agreed System Plan voted in favor of the Plan.

CONCLUSION.

Respondents most earnestly urge that the Petition for Certiorari be denied.

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